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v.
Michael Mose Chesternut

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Counsel for petitioner: Solak,Andrea

Counsel for respondent: Stanyar,Carole M.

Entry	Date	Note	Proceedings and Orders
1	May 12 1987	G	Petition for writ of certiorari filed.
3	Jun 8 1987		Order extending time to file response to petition until July 20, 1987.
4	Jul 14 1987		Brief of respondent Michael Chesternut in opposition filed.
5	Jul 14 1987	G	Motion of respondent for leave to proceed in forma pauperis filed.
6	Jul 22 1987		DISTRIBUTED. September 28, 1987
8	Oct 2 1987		REDISTRIBUTED. October 9, 1987
9	Oct 13 1987		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Oct 13 1987		Petition GRANTED. ***
11	Nov 19 1987		Joint appendix filed.
12	Nov 19 1987		Brief of petitioner Michigan filed.
13	Nov 27 1987		Brief amici curiae of Americans for Effective Law Enforcemennt, et al. filed.
14	Nov 27 1987		Brief amici curiae of Alabama, et al. filed.
15	Nov 27 1987		Brief amicus curiae of United States filed.
19	Dec 19 1987	X	Brief of respondent Michael Chesternut filed.
17	Dec 21 1987		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers filed.
18	Dec 29 1987		CIRCULATED.
20	Jan 5 1988		SET FOR ARGUMENT. Wednesday, February 24, 1988. (3rd case). (1 hour).
22	Feb 11 1988	X	Supplemental brief of petitioner Michigan filed.
21	Feb 16 1988		Record filed.
		*	Certified copy of original record received.
23	Feb 24 1988		ARGUED.

PETITION FOR WRIT OF CERTIORARI

86 1824 (1)

Supreme Court, U.S.
FILED
MAY 12 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. ____________

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

MICHAEL MOSE CHESTERNUT, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

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59 pp

QUESTIONS PRESENTED

I.

IS THE FOURTH AMENDMENT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT NARCOTICS THROWN TO THE GROUND BY THE INDIVIDUAL CANNOT BE CONSIDERED ABANDONED ABSENT PROBABLE CAUSE OR REASONABLE SUSPICION TO UNDERTAKE THE PURSUIT? (Certiorari was granted on this issue in _Michigan_ v _Shabaz_ ___ L Ed2d ___(1986); dismissed as moot upon the death of the Respon- dent.)

II.

IF THE ANSWER TO QUESTION I IS THAT THE PURSUIT ITSELF, INDEPENDENT FROM THE SEIZURE, REQUIRES SOME LEVEL OF CAUSE, THEN DID THE FLIGHT OF THE RESPONDENT AFTER OBSERVATION OF THE MARKED POLICE CAR, CONSTITUTE REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE PEOPLE OF THE STATE OF MICHIGAN,

PETITIONER

vs.

MICHAEL MOSE CHESTERNUT, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and Andrea L. Solak, Principal Attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan entered in the above-entitled cause on October 17, 1986, leave denied by the Michigan Supreme Court March 24, 1987 (2 Justices dissenting).

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and is appended as Appendix A. The Order of the Michigan Supreme Court is unreported and is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on October 17, 1986. The Order denying an application for leave to appeal by the Michigan Supreme Court was entered on March 24, 1987. The jurisdiction of this Court is invoked under 28 USC Sec 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the

> privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant was charged with knowingly and intentionally possessing Heroin, Codein and Diazapam in a complaint and warrant. On April 3, 1985 a preliminary examination was held before the Honorable Longworth D. Quinn, Judge of the 36th District Court for the City of Detroit. Kenneth Peltier testified at the preliminary examination that he is a police officer assigned to the 15th Precinct. On December 19, 1984 he was working with three partners in plain

clothes and riding in Number 15 Cruiser on a routine patrol in the vicinity of Shoemaker and St. Clair. The cruiser was proceeding eastbound on Shoemaker, just east of St. Clair at approximately 12:30 p.m. when he observed a 1977 Olds pull up to the curb and a gentleman get out and walk up to a black male standing on the corner. The defendant was identified as the man standing on the street corner. The police cruiser was proceeding west, perhaps a half block away, when the defendant looked in the direction of the cruiser, turned and started running. The cruiser pulled around the corner. The defendant was about halfway down the length of the apartment building when he threw a number of packets from his right-hand pocket. He went about another five feet and just stopped. At this point the officer exited the cruiser, picked up the packets, opened up some of the packets and found them to contain pills which he believed to be narcotics, based on having seen pills like them before. There were about 25 pills in the packet which was opened. The defendant was arrested for possession of narcotics and conveyed to the 15th precinct for a custodial search which yielded a package containing powder believed to be heroin and a hypodermic needle in the hat-band of the defendant's hat. The items were placed in lock-sealed folders which for purposes of examination only were stipulated to have contained a hypodermic needle and powder weighing .25 grams of heroin. The packets contained 11 blue tablets identified as diazapam, one white tablet identified as codeine and other white tablets for which there was no analysis. The man who was seen getting out of the car was arrested for driving without a license. On cross examination,

the officer stated he did not specifically work in the narcotics section. The officer clarified the distance his police cruiser was from the 1977 Olds when he first observed it to be about a block and one half.

The officer indicated the cruiser was on a routine patrol. The area contained some vacant buildings, a party store and an apartment building. There were some people in the area, but not in the immediate area of the incident. At the time that the defendant spotted the police cruiser and began running, the police were still within the car. The officer testified that he did not actually pursue the defendant on foot, they simply pulled around the corner and started up St. Clair driving parallel to him as he ran. The court inquired if they chased him with the car and the officer replied "yes". The officer testified that at no time did he lose sight of the defendant. When the defendant tossed the packets, they were found on the sidewalk right next to the building. The officer recognized the pills to be codeine, having seen them before in hospitals and in working in the capacity of a paramedic. The Petitioner moved to bindover on the charges contained in the complaint and warrant and the Respondent interposed an objection. The Petitioner answered the objection by noting that the police did not make a stop of the defendant until he saw the packets thrown by the defendant, and it was at that point that the officers saw what amounted to probable cause. It was further noted that the officers did not stop the defendant until after the packets were retrieved and determined to be suspected narcotics.

The trial court felt an empathy for otherwise law abiding joggers and thus dismissed the case based on a finding that there was an illegal investigatory pursuit.

REASONS FOR GRANTING THE WRIT

The Michigan Court of Appeals reluctantly affirmed a trial court dismissal of a possession of a concealed weapons charge based on the precedent of People v Shabaz, 424 Mich 42 (1985) cert. granted __L Ed2d __ (1986); dismissed as moot upon the death of the Respondent. The Michigan Supreme Court denied an application for leave to appeal. Michigan in the Shabaz case has adopted the three generic classes of police-citizen encounters proposed by Justice White in the plurality opinion in Florida v Royer, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983); yet, it is submitted that Michigan has misconstrued its application. The State argued that there was no Fourth Amendment infringement, characterizing the police-citizen encounter as an "investigatory pursuit", based on reasonable suspicion and "an assessment of the whole picture" from the specialized viewpoint of the trained law enforcement officer. United States v Cortez, 449 US 411, 417; 101 S Ct 690; 66 L Ed 2d 621 (1981). The Court of Appeals held that Respondent was not free to go on his way, thus his freedom was restricted without a showing of reasonable suspicion. Two Justices of the Michigan Supreme Court would have granted an application, including Justice Boyle, who dissented in the Shabaz case and who found as a matter of law that the act of running after another is not a detention for investigation, thus the conduct did not constitute a stop nor violate Fourth Amendment privacy rights. It is submitted that the latter interpretation accords with this Court's definition of a seizure.

> We adhere to the view that a person is 'seized' only when, by means of physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.
>
> United States v Mendenhall, 446 US 544,553-4; 100 S Ct 1870; 64 L Ed 2d 497 (1980).

The instant facts demonstrate there was no infringement of a citizen's right to walk away, nor any restraint upon the liberty of a citizen who took his own evasive course of action upon sighting an marked car. If the Fourth Amendment is not implicated, the retrieval of the abandoned property is not a result of illegal police action, and is not subject to the poisonous tree analysis under Wong Sun v United States, 371 US 471; 83 S Ct 407; 9 L Ed2d 441 (1963).

If the pursuit itself, independent from the seizure, requires some level of cause, the unprecipitated flight of the Respondent upon observation of a marked police car, constitutes reasonable suspicion from the specialized viewpoint of a trained law enforcement officer. Cortez, supra at 417; United States v Green, 670 F 2d 1148, 1152 (CA DC, 1981). Terry v Ohio, 392 US 1; 88 SCt 1868; 20 L Ed 2d (1968).

CONCLUSION

It is respectfully submitted that for the reasons outlined above, plenary review should be granted.

Respectfully submitted,

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Dated: May 5, 1987
ALS/dh

APPENDICES

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant

v.

October 17, 1986
No. 87071

MICHAEL MOSE CHESTERNUT,
Defendant-Appellee.

Before: MacKenzie, P.J., S.J. Bronson and R.A. Benson, * JJ.

PER CURIAM

The prosecutor appeals by leave granted from an order granting defendant's motion to suppress the evidence and dismiss the charges. Defendant had been originally charged with knowingly possessing various illegal drugs. The evidence was suppressed and the charges dismissed based on a finding that there had been an illegal search and seizure of the defendant.

---

*Circuit judge, sitting on the Court of Appeals by assignment.

The facts indicate that defendant was standing on a street corner talking with another man when a marked police car appeared at the corner on routine patrol. When the defendant saw the police car he started running and the police gave chase in their patrol car. Detroit police officer Kenneth Peltier testified that they chased the defendant because he ran and they wanted to see where he was going. While pursuing the defendant, the police saw the defendant throw something on the ground, then stop. Upon recovery of the packets thrown down by the defendant the police determined that they contained suspected drugs and defendant was arrested. The examining magistrate and the trial court suppressed the evidence seized based on People v Terrell, 77 Mich App 676; 259 NW2d 187

(1977), finding that because the police had admittedly not seen the defendant do anything wrong, it was illegal to pursue him.

Appellate review of a lower court's grant or denial of a motion to suppress evidence is made under the clearly erroneous standard. People v Burrell, 417 Mich 439; 339 NW2d 403 (1983). A lower court's finding will be found to be clearly erroneous only where, although there is evidence to support the ruling, the reviewing court is left with a definite and firm conviction that a mistake has been made. People v United States Currency, 148 Mich App 326, 329; 383 NW2d 633 (1986). In this case, although we find the result unfortunate, we cannot say that the lower court's ruling was clearly erroneous under the present law of the facts presented.

It is undisputed in this case that when the police decided to pursue the defendant they did not possess probable cause to arrest him, but simply wanted to investigate why he was running. In People v Terrell, supra, at 679, this Court held that a police officers investigatory pursuit of a defendant must be tested by the Fourth Amendments general proscription against unreasonable searches and seizures. As soon as the officers began their pursuit, defendants freedom was restricted. Based on Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed 2d 889 (1968), the criteria for a constitutionally valid limited intrusion upon a citizens liberty, short of probable cause for arrest, are that the police must have a particularized suspicion, based on an objective observation, that the person investigated has been, is, or is about to be engaged in criminal wrongdoing. People v Shabaz, 424 Mich 42, 59; 378 NW2d 491 (1985).[illegible] In both Terrell and Shabaz, the courts determined that flight from the police alone does not provide the reasonable suspicion necessary to justify a Terry-type investigation.

After reviewing the record in this case we are unable to conclude that the totality of facts known to the officers when they pursued the defendant provided them with a reasonable belief that criminal activity was afoot. The police testified they they (sic) pursued the defendant simply because he ran when he

spotted their car. Certainly, the fact that defendant ran may have aroused the officers general suspicion, but without some specific additional knowledge was insufficient to justify their pursuit and eventual stop of the defendant. Terrell, supra, at 680. There was no testimony in this case that the defendant was observed in a high crime area where street drug dealing was common, which along with the defendants flight, may have provided the police with the articulable facts which would have warranted an investigatory pursuit. See, e.g., People v Carter, 98 Mich App 694, 698-699; 293 NW2d 681 (1980), lv den 410 Mich 872 (1980). Rather, in this case, the police saw the defendant do absolutely nothing illegal nor did they observe other suspicious activity. Since the defendants divestment of the packets was in direct response to the officers unjustified seizure, the trial court did not err in suppressing the evidence. Shabaz, supra, at 66.

Therefore, based on Shabaz and Terrell, we reluctantly affirm the ruling of the court below.

/s/ Barbara B. MacKenzie
/s/ S. Jerome Bronson
/s/ Robert A. Benson

AT A SESSION OF THE SUPREME COURT OF THE STATE OF MICHIGAN, Held at the Supreme Court Room, in the City of Lansing, on the 24th day of March, in the year of our Lord one thousand nine hundred and eighty-seven.

Present the Honorable
DOROTHY COMSTOCK RILEY,
Chief Justice
79731
CHARLES L. LEVIN,
JAMES H. BRICKLEY,
MICHAEL F. CAVANAGH,
PATRICIA J. BOYLE,
DENNIS W. ARCHER,
ROBERT P. GRIFFIN,
Associate Justices

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SC: 79731
COA: 87071
CC: 185-024
DC: 85-70206

MICHAEL MOSE CHESTERNUT

Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

ORDER OF THE MICHIGAN SUPREME COURT

Boyle and Griffin, JJ., would grant leave to appeal.

STATE OF MICHIGAN -- ss.

I, CORBIN R. DAVIS, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing this 24th day of March in the year of our Lord one thousand nine hundred and eighty-seven.

(seal)

/s/ Corbin R. Davis Clerk.

OPPOSITION

BRIEF

EDITOR'S NOTE

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NO. 86-1824

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

STATE OF MICHIGAN

Petitioner,

v.

MICHAEL MOSE CHESTERNUT

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF MICHIGAN**

RESPONDENT'S BRIEF IN OPPOSITION

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Dated: July 13, 1987

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I. WHETHER THE MICHIGAN COURT OF APPEALS ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN RULING THAT A RANDOM VEHICULAR POLICE CHASE OF RESPONDENT-PEDESTRIAN CONSTITUTES AN INTRUSION ON HIS FOURTH AMENDMENT RIGHTS AND AN UNCONSTITUTIONAL SEIZURE WHERE THE INVESTIGATIVE METHOD EMPLOYED SERVES NO SPECIAL LAW ENFORCEMENT INTEREST.

II. WHETHER THE MICHIGAN COURT OF APPEALS ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN RULING THAT POLICE OFFICERS DID NOT HAVE REASONABLE SUSPICION SUFFICIENT TO JUSTIFY A FOURTH AMENDMENT INTRUSION WHERE PRIOR TO THEIR INITIATING A CHASE OF RESPONDENT THEY DID NOT HAVE ANY REASON TO SUSPECT THAT RESPONDENT WAS ENGAGED IN CRIMINAL ACTIVITY AND WHERE THE ONLY FACTOR OFFERED TO JUSTIFY THEIR ENSUING CHASE WAS THAT RESPONDENT RAN FROM A STREET CORNER AS THE OFFICERS APPROACHED HIM IN THEIR POLICE VEHICLE.

III. WHETHER THE COURT OF APPEALS' CONCLUSION, THAT THE RANDOM VEHICULAR POLICE CHASE OF RESPONDENT-PEDESTRIAN WAS A FOURTH AMENDMENT SEIZURE AND THAT IT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, PRESENTS EITHER AN UNSETTLED, A SUBSTANTIAL OR A PRESSING FEDERAL QUESTION.

IV. WHETHER THIS CASE DOES NOT PRESENT THE SAME VEHICLE FOR INTERPRETING A "SHOW OF AUTHORITY" AS WAS PRESENTED IN MICHIGAN V. SHABAZ, 424 MICH. 42, 378 N.W.2D 451 (1985), CERT. GRANTED ____U.S.____, 106 S.CT. 1489, 89 L.ED.2D 891, CERT. DISMISSED, ____U.S.____ 106 S.CT. 3326, 92 L.ED.2D 733 (1986), GIVEN THE IMPORTANT FACTUAL DISTINCTION BETWEEN THIS CASE AND SHABAZ, THE LATTER INVOLVING A CHASE BY PLAIN-CLOTHED POLICE OFFICERS IN AN UNMARKED VEHICLE AND AN ASSERTION BY SHABAZ ON THOSE FACTS THAT HE DID NOT KNOW THAT HIS PURSUERS WERE POLICE OFFICERS.

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COUNTERSTATEMENT OF THE CASE

Defendant-respondent was charged with knowingly and intentionally possessing heroin, codeine and diazepam. At preliminary examination, respondent's motion to suppress the evidence and to dismiss the charges was granted by the district court based upon a finding that there had been an illegal search and seizure of the respondent. That ruling was subsequently affirmed by the trial court and by the Michigan Court of Appeals. On March 24, 1987, the Michigan Supreme Court denied prosecutor-petitioner's application for leave to appeal.

The charges arose out of the following incident. On December 19, 1984, at 12:30 p.m. four police officers were travelling in a marked police cruiser westbound on Shoemaker east of St. Clair in the City of Detroit. The intersection in question was mixed commercial-residential with a party store, an apartment building and some vacant buildings in the vicinity of the corner. Officer Kenneth Peltier, the only witness at the preliminary hearing, testified that he and his partners were on routine patrol and were not specifically assigned to concentrate on narcotics activity. There was no indication by the officer that he believed this to be a high-crime area where street drug dealing was common. He had no information concerning respondent or any crime involving a person of the description of respondent. Officer Peltier testified that he first focussed on a blue 1977 Oldsmobile at that intersection, although he did not know why that vehicle caught his attention. When Officer Peltier first noticed the Olds, his cruiser was positioned approximately one and a half to two blocks away from the Olds. The driver of the Olds, a black male later identified as Mr. Yancy, got out of his vehicle and walked up to respondent, also a black male, who was standing on the corner. As the officers proceeded westbound on Shoemaker toward the intersection, Officer Peltier observed respondent look in the direction of the officers, turn and begin to run on St. Clair. The officers were a half block away from respondent when they observed him leave the corner. At this point, by Officer Peltier's own account, the officers proceeded to the intersection, pulled around the corner and "chased [respondent] with the car." As the cruiser pulled around the corner, respondent was about halfway down the length of an apartment building located on St. Clair. Throughout the chase, the cruiser was progressing at a rate such that Officer Peltier never lost sight of respondent, notwithstanding the fact that respondent was running all the while and the fact that buildings were located at the corner in question. As respondent ran up St. Clair, the cruiser travelled at a rate that enabled the officers to close the distance between themselves and respondent until they were "running parallel with him." Throughout this chase, there was no one in the immediate vicinity other that respondent and Yancy, with Yancy presumably remaining at the intersection near his Oldsmobile. When both the cruiser and respondent were on St. Clair and when the officers were in the process of chasing or running parallel with respondent, respondent removed packets from his right hand pocket, tossed the packets to the sidewalk next to the apartment building and then promptly stopped within the space of about five feet. Officer Peltier exited the cruiser, confiscated and searched the packets, and arrested respondent for possession of a suspected controlled substance. A subsequent custodial search of respondent uncovered a further packet and a hypodermic needle in the band of respondent's hat.

REASONS FOR DENYING THE WRIT

I. THE MICHIGAN COURT OF APPEALS ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN RULING THAT A RANDOM VEHICULAR POLICE CHASE OF RESPONDENT-PEDESTRIAN CONSTITUTES AN INTRUSION ON HIS FOURTH AMENDMENT RIGHTS AND AN UNCONSTITUTIONAL SEIZURE WHERE THE INVESTIGATIVE METHOD EMPLOYED SERVES NO SPECIAL LAW ENFORCEMENT INTEREST.

Fourth Amendment analysis of a police-citizen confrontation begins with the balancing of competing interests. Michigan v. Summers, 452 U.S. 692, 700, n. 12; (1981). In the present context of a random police chase of respondent, the analysis

involves a weighing of the special law enforcement interest served, if any, against an individual's right to personal security and privacy free from arbitrary interference by law officers. Brown v. Texas, 443 U.S. 47, 52; (1979). Respondent submits that the Michigan courts struck that balance in a manner consistent with the applicable decisions of this Court in finding that this chase involved a Fourth Amendment intrusion by virtue of an unjustified show of authority by police officers.

The nature of the right a citizen brings with him to any police-citizen encounter has been described variously by members of this Court as the right to personal security and privacy, Brown, supra, "The right to be left alone," Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), the liberty interest involved in proceeding with one's chosen itinerary, United States, v. Place, 462 U.S. 696, 708 (1983), and the "equal right [of a citizen] to ignore his [police] interrogator and walk away." Terry v. Ohio, 392 U.S. 1, 33 (1968) (Harlan, J., concurring). By the same token, that collective right is violated variously when "a police officer accosts an individual and restrains his freedom to walk away," Terry, 392 U.S. at 16, or where official authority is exercised such that "a reasonable person would have believed he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980). This court has listed circumstances evidencing a seizure by "show of authority," among them "the threatening presence of several officers," and "the use of language or a tone of voice indicating that compliance with the officer's request might be compelled." Id. A seizure by virtue of a show of authority may also occur where "the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded..." Immigration and Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984).

The initial encounter occurred in this case when the officers' vehicle approached respondent at the street corner. At that moment respondent exercised his right to "refuse to cooperate and go on his way" by running from the intersection. *Terry*, 392 U.S. at 34 (White, J., concurring). The officers responded by "chasing" respondent in their police vehicle. Officer Peltier's characterization of the pursuit as a "chase" is corroborated by the objective facts of record. We can infer that the officers' vehicle was travelling at a high rate of speed from the following facts. The officers' vehicle travelled a distance of one-half block westbound on Shoemaker, maneuvered a right turn, and then travelled half the length of the apartment building on St. Clair in the same amount of time that it took respondent to run from the street corner to the middle of the apartment building on St. Clair. Put simply, the officers covered more than twice the ground as respondent in the same amount of time, and respondent was running. That their chase focussed on respondent at its inception is evidenced by the fact they pursued him alone around the corner and down St. Clair. Any question respondent may have had as to the target of the chase was dispelled when the officers overtook him on St. Clair by running parallel with him, placing him between their vehicle and the apartment structure. In that position, respondent was undoubtedly aware that the police cruiser carried four officers. Albeit wordless, the message was clear. His departure from the corner was not acceptable to these officers. Just as vividly as the *Mendenhall* "tone of voice," these officers communicated to respondent that "compliance with [their] request might be compelled." Respondent's next actions demonstrate his reasonable belief that he was not free to leave. He discarded the packets in plain view of the officers without any apparent attempt to conceal his actions, and then he stopped. Yet another wordless communiqué in this scenario -- "You've got me." Respondent's tossing of the packets occurred as a result of the chase after he realized that the officers were not going to allow him to go on his way.

Other state courts of last resort have found seizures or a comparable violation of the collective right described above in the context of a police chase of a citizen. *See e.g.* *State* v. *Saia*, 302 So.2d 869 (La. 1974), *cert. denied*, 420 U.S. 1008 (1975), cited with approval in 3 W.R. LaFave, Search and Seizure, Sec. 9.2(h), pp. 408, 413, n.250 (2d ed. 1987); *People* v. *Thomas*, 660 P.2d 1272 (Colo. 1983) *Commonwealth* v. *Thibeau*, 429 N.E.2d 1009 (Mass. 1981); *People* v. *Howard*, 50 N.Y.2d 583, 430 N.Y.S.2d 578, 408 N.E.2d 908, *cert. denied* 449 U.S. 1023 (1980). In *Saia*, where officers pursued a woman who had obviously chosen to avoid their presence, the court held,

> ...[t]he police cannot approach citizens under circumstances that make it seem that some form of detention is imminent unless they have probable cause to arrest the individual or reasonable grounds to detain the individual under *Terry* v. *Ohio*, *supra*. Police officers cannot actively create "street encounters" unless they have knowledge of suspicious facts and circumstances sufficient to allow them to infringe on the suspect's right to be free from governmental interference. *United States* v. *Ward*, [488 F.2d 162 (9th Cir. 1973)]

302 So.2d at 873. *Thibeau* involved a chase of a bicyclist by officers in marked cruiser.

> ...Stops provoke constitutional scrutiny because they encumber one's freedom of movement. Pursuit that appears designed to effect a stop is no less intrusive than a stop itself. In other words, the officer's right to pursue when a stop appears imminent can be no broader than his right to stop.

429 N.E.2d at 1010.

The other side of the Fourth Amendment equation involves an examination of the justification for the intrusion; here, an assessment of the special law enforcement interest presented. The question here becomes "what articulable law enforcement concern required the officers to chase respondent as opposed to merely following him in a less intrusive way?" Several recent cases have presented this Court with examples of lofty and legitimate special law enforcement interests. *Florida* v. *Royer*, 460 U.S. 491 (1983); *United States* v. *Mendenhall*, *supra* (illicit drug traffic); *Delgado*, *supra*; *United States* v. *Martinez-Fuerte*, 425 U.S. 543 (1976) (illegal aliens). In some instances, *see e.g.* *Mendenhall* and *Delgado*, the stated law enforcement objective so outweighed the relative individual intrusion that the Fourth Amendment was said not to be implicated at all.[1] Three characteristics evolved in these cases which will be useful in evaluating the law enforcement concern in the present case. First, each case presented a specific crime problem of immense and growing proportions. In *Mendenhall* the concern was large-scale drug trafficking through international airports by sophisticated and organized criminal syndicates. 446 U.S. at 561-562 (Powell, J., concurring). In *Delgado* the Court addressed problems created by "the presence of large numbers of undocumented aliens," in the workplace. 466 U.S. at 239 (Powell, J., concurring). Second, the investigative methods employed in these cases were sophisticated and uniquely suited to the crime problem addressed. For example, drug enforcement agents received specialized training and utilized the elaborate "drug courier profile" in their investigations. *Florida* v. *Royer*, 460 U.S. at 525, n.6 (Rehnquist, J., dissenting). Thirdly, the investigative methods employed were the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. *See e.g.* *Delgado*, 466 U.S. at 219; *Mendenhall*, 446 U.S. at 555.

In contrast, Officer Peltier was an officer in the "uniform division" of his precinct and was not assigned to any specialized narcotics division. The officers were on routine patrol and there is no indication that this was a high-narcotics or high-crime area of any kind. When asked by the court why he "chased" respondent, Officer Peltier responded, "to see where he was going." No legitimate justification is ever offered for "chasing" as an investigative method, as opposed to lesser intrusions such as continued surveillance or simply following respondent.

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[1] *Cf.* *Brown* v. *Texas*, 443 U.S. at 52, where the proffered objective of *general crime* prevention in large metropolitan areas was considered "weighty," but insufficient to justify a comparable intrusion.

In summary, the central teaching of the Fourth Amendment is reasonableness attained by the balancing of competing interests. An inescapable corollary to that principle is that where the legitimate law enforcement interest is minimal or non-existent, less of an intrusion should be tolerated.

II. THE MICHIGAN COURT OF APPEALS ACCURATELY INTERPRETED FEDERAL CONSTITUTIONAL PRINCIPLES IN RULING THAT POLICE OFFICERS DID NOT HAVE REASONABLE SUSPICION SUFFICIENT TO JUSTIFY A FOURTH AMENDMENT INTRUSION WHERE PRIOR TO THEIR INITIATING A CHASE OF RESPONDENT THEY DID NOT HAVE ANY REASON TO SUSPECT THAT RESPONDENT WAS ENGAGED IN CRIMINAL ACTIVITY AND WHERE THE ONLY FACTOR OFFERED TO JUSTIFY THEIR ENSUING CHASE WAS THAT RESPONDENT RAN FROM A STREET CORNER AS THE OFFICERS APPROACHED HIM IN THEIR POLICE VEHICLE.

Fourth Amendment seizures which fall short of traditional arrests are justifiable only if the officer involved has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981). In this phase of the analysis, the government "must be able to point to specific and articulable facts, which, taken together with rational inferences from those facts reasonably warrant the intrusion." *Terry*, 392 U.S. at 21. The rationale for these guidelines was expressed in *Brown* v. *Texas*, 443 U.S. at 52: "[w]hen a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."

Respondent submits that the Michigan courts accurately concluded that the objective facts necessary to justify the intrusion were wholly lacking in this case. In deciding to chase respondent, Officer Peltier did not claim to be drawing from specialized training or some heightened awareness "of the modes or patterns of operations of certain kinds of lawbreakers." *United States* v. *Cortez*, 449 U.S. at 418. *Cf* *Mendenhall*, *supra* ("drug courier profile"); *Martinez-Fuerte*, *supra* (transportation of illegal Mexican aliens). The intersection involved here was not known as a high-crime area. The officer had no information concerning respondent or any crime involving a person of the description of respondent. Prior to respondent's departure from the corner, the officer did not observe respondent do anything suspicious or anything even remotely related to criminal activity. Officer Peltier's only proffered factual justification for the chase is that respondent ran and Peltier wanted "to see where he was going."

It is uncontested that the only factor relied on to justify the chase is flight. Regarding the right of respondent to avoid police presence and the evidentiary significance of exercising that right, this Court instructed in *Royer*,

> ...[t]he person approached, however, need not answer any question put to him, indeed, he may decline to listen to the questions at all and may go on his way. *He may not be detained even momentarily without reasonable objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds*...

460 U.S. at 497-498 (citations omitted) (emphasis added). "Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion." *Thibeau*, 429 N.E.2d at 1010. "In the absence of any underlying facts objectively warranting a reasonable suspicion of criminal activity, the defendant's 'departure.... from an imminent intrusion cannot bootstrap an illegal detention into one that is legal.' " *United States* v. *Bennett*, 514 A.2d 414, 420 (D.C. App. 1986) (Mack , J., dissenting) citing *People* v. *Aldridge*, 35 Cal. 3d 473, 479; 198 Cal. Rptr. 538, 541; 674 P.2d 240, 243 (1984). Respondent should not have to forfeit his right to be free from a *Royer* "second-tier" seizure simply because he has exercised his right to remain silent and to walk away. That respondent chose to run rather than walk away is a distinction without a difference because flight, regardless of the form it takes, is not "a reliable indicator of guilt without other circumstances to make its import less ambiguous." *Hinton* v. *United States*, 424 F.2d 876, 879 (D.C.Cir. 1969) *See also* *People* v. *Howard*, *supra*; *Commonwealth* v. *Jeffries*, 311 A.2d 914 (Pa. 1973);; *People* v. *Thomas*, *supra*; *People* v. *Shabaz*, *supra* (flight by running) *Commonwealth* v. *Thibeau*, *supra*, (flight by bicycle).

III. THE COURT OF APPEALS' CONCLUSION, THAT THE RANDOM VEHICULAR POLICE CHASE OF RESPONDENT-PEDESTRIAN WAS A FOURTH AMENDMENT SEIZURE AND THAT IT WAS NOT JUSTIFIED BY REASONABLE SUSPICION, PRESENTS NEITHER AN UNSETTLED, A SUBSTANTIAL OR A PRESSING FEDERAL QUESTION.

The notion that a Fourth Amendment seizure can result from a show of authority is certainly not a novel one. The standard proposed by Justice Stewart in *Mendenhall*, (see discussion *supra*) has been adopted by a majority of the Court and has been applied consistently in subsequent "show of authority" cases. *See e.g.* *Royer*, *Delgado*, *Place*, *supra*. Respondent submits that there is no new ground to be gained in this case because it presents a routine application of show of authority doctrine and nothing more. The idea that furtive gestures, if coupled with other circumstances, may contribute to an officer's articulable basis for a stop has likewise been addressed by this Court recently in *Florida* v. *Rodriguez*, 469 U.S. 1 (1984).

Any distinguishing features of this case are of little general significance. Cases like this one involving flight will arise very infrequently because few individuals feel they can walk away or refuse to answer. A.L.I. Model Code of Pre-Arraignment Procedure 257-258 (1975). Moreover most fact situations which involve flight also involve other suspicious circumstances such that a court need not reach the issue of a seizure; instead, resolving the case on reasonable suspicion grounds. *See e.g.* *United States* v. *Bennett*, 514 A.2d at 415, n 2.

This case does not address a problem of immense proportions as in *Mendenhall* and *Rodriguez*, where law enforcement was pitted against highly sophisticated, international drug traffickers. The facts of record portray Mr. Chesternut as a street level consumer as evidenced by the hypodermic needle in his hatband and the small amount of narcotics seized. Nor does this case involve a large-scale law enforcement investigative method which itself will generate recurrent Fourth Amendment challenges. *Cf* *Delgado*.

Respondent submits further that because this precise fact situation occurs rarely, the notion of a seizure by a police chase has not been adequately developed by the courts below,[2] and consequently this Court should not review the issue at this time. Once the idea is litigated fully below, this Court may very well conclude that this is just an alternate fact situation fairly encompassed by the existing definition of a show of authority. In summary, the creation of a subset definition to govern show of authority "chase" cases is unnecessary and premature. Undoubtedly it would generate more litigation for this Court.

IV. THIS CASE DOES NOT PRESENT THE SAME VEHICLE FOR INTERPRETING A "SHOW OF AUTHORITY" AS WAS PRESENTED IN *MICHIGAN V. SHABAZ*, 424 MICH. 42, 378 N.W.2D 451 (1985), *CERT. GRANTED* ___ U.S. ___, 106 S.CT. 1489, 89 L.ED.2D 891, *CERT. DISMISSED*, ___ U.S. ___ 106 S.CT. 3326, 92 L.ED.2D 733 (1986), GIVEN THE IMPORTANT FACTUAL DISTINCTION BETWEEN THIS CASE AND *SHABAZ*, THE LATTER INVOLVING A CHASE BY PLAIN-CLOTHED POLICE OFFICERS IN AN UNMARKED VEHICLE AND AN ASSERTION BY SHABAZ ON THOSE FACTS THAT HE DID NOT KNOW THAT HIS PURSUERS WERE POLICE OFFICERS.

In her first "Question Presented" to this Court, petitioner likens this case to *Michigan* v. *Shabaz*, *supra* in which this Court granted certiorari. Respondent submits that there is a crucial factual distinction between the cases in that Mr. Shabaz was chased by plain-clothed officers in an unmarked vehicle. On those facts the issue presented was whether an official show of authority was involved at all. This case is clearly not the same vehicle for deciding that issue.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

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[2] In the seminal Michigan case of *Shabaz*, this precise issue was never even litigated by the parties below, although the Court did "pass" on the question. *Shabaz*, 424 Mich. at 59, n7.

Respectfully submitted,

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Dated: July 15, 1987

JOINT
APPENDIX

③

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1824

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

MICHAEL MOSE CHESTERNUT
Respondent

JOINT APPENDIX

WAYNE COUNTY PROSECUTOR'S OFFICE

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PETITION FOR A WRIT OF CERTIORARI
FILED MAY 12, 1987
CERTIORARI GRANTED OCTOBER 13, 1987

BEST AVAILABLE COPY

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1985

April 31	Preliminary Exam held Bindover denied
August 1	Order of Detroit Recorder's Court affirming dismissal of complaint and warrant.

1986

Jan. 13	Application for Leave to Appeal to the Michigan Court of Appeals granted
Oct. 17	Opinion of Michigan Court of Appeals affirming rulings of court below

1987

March 24	Application for Leave to Appeal to the Michigan Supreme Court denied

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RECORDER'S COURT OPINION AND ORDER

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff,

v No. 185-024
D.C. No. 85-70206

MICHAEL MOSE CHESTERNUT,

Defendant.

OPINION

Defendant in the above-entitled case was charged in a three-count warrant with knowingly and intentionally possessing a quantity of heroin, contrary to MCLA 333.7403(2)(a), a quantity of tablets containing codeine, contrary to MCLA 333.7403(2)(b), and a quantity of tablets containing diazepam, contrary to MCLA 333.7403(2)(b).

At the conclusion of the preliminary examination in the 36th District Court, the magistrate dismissed the complaint and warrant on the basis of People v Terrell, 77 Mich App 676 (1977), the substance of which was that the unjustified pursuit of a suspect by an officer is, itself, an unlawful invasion of Fourth Amendment rights. The Terrell Court concluded, therefore, that contraband seized by an officer which was discarded in the course of that pursuit was unlawfully seized.

An appeal from the order of dismissal has been filed on behalf of the People. The record of the preliminary examination in this instance reflects facts testified to by one of the arresting officers, as follows:

Defendant was observed looking in the direction of the officers, after which he "turned and started running on St. Clair." He was followed by the parole car for a short distance. Defendant took a "number of packets" from his pocket, continued for a short distance and

stopped. The packets were retrieved by an officer who opened them, found suspected narcotics, and arrested defendant. Upon a custodial search of defendants person, other suspected controlled substances, together with a hypodermic needle, were found.

The officer conceded that they had no information regarding narcotics prior to encountering the suspect.

In its Statement of Question, the appellant has, quite aptly, stated the standard for review of the magistrate's dismissal by the query of whether the magistrate's dismissal was clearly erroneous, since it is by this standard that the Court must review the action of the magistrate. See People v Terrell, supra, and People v Triplett, 68 Mich App 531, 535; 243 NW2d 665 (1976); lv den 397 Mich 842 (1976).

The principle recited in Terrell, supra p. 679, in relation to the pursuit of suspects is instructive. Relying on Terry v Ohio, 392 US 1; 88 S Ct 1868; 20 L Ed2d 889 (1968), the Court of Appeals, in the clearest of language, said:

> "The police officer's investigatory pursuit of defendant must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."

The Court went on to point out:

> "A totality of facts and circumstances which could provide the officer with a reasonable belief that criminal activity was afoot was simply lacking in the instant case."

In the case at hand, the "totality of facts and circumstances" prevailing prior to the pursuit could not and did not support a reasonable belief that a crime was taking place. This is one factor which distinguishes this case from People v Williams, 109 Mich App 768 (1981), which is relied upon by the People. Among the circumstances present in Williams was the prior knowledge of the officers of numerous complaints concerning breakings and enterings, drug trafficking, and street robbery. Another distinguishing factor in Williams was the absence of any pursuit before the discard of the controlled substance took place. In other words, there was simply no conduct on the part of the officers which could be called a Fourth Amendment intrusion before the envelope was dropped. Indeed, the Court of Appeals emphasized that (Williams) "was not a case wherein police engaged in an 'investigatory pursuit' of a suspect" as in Terrell. Id. at 770, 109 Mich App 768 (1981).

The attention of the Court has not been invited to any Michigan case in which the opinion in Terrell has been overruled. As already pointed out, the Court of Appeals distinguished Williams from Terrell. In effect, it did the same thing in People v Carter, 96 Mich App 694, 698; 293 NW2d 681 (1980). More importantly, in Carter the Court pointedly agreed with its earlier decision in Terrell that "police officers' investigatory pursuit (of a defendant) must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures."

The People argue on appeal that the Fourth Amendment was never "triggered" in this case for the reason that there was no stop or detention, and that the act of throwing the packets to the ground constituted an act of abandonment. At the preliminary examination, the People did not argue an abandonment theory.

Even had they done so, it should have been to no avail in view of the fact that the police pursuit had begun before the items were dropped. Moreover, if this is true, this Court cannot be persuaded by the argument that the "Fourth Amendment was not triggered." To reach this conclusion one would have to ignore the language cited above from Court of Appeals decisions involving "investigatory pursuits."

In the opinion of this Court, the decision of the magistrate was not in disharmony with the well-established principle that the recognized rules of evidence apply at preliminary examination, [People v Charles D. Walker, 385 Mich 565; 189 NW2d 234 (1971)], nor with the equally-recognized rule that in order to bind a defendant over for trial at preliminary examination, "There must be a showing from legally admissible evidence that a crime has been committed and that there is probable cause to believe that the defendant committed it." People v Washington, 84 Mich App 750; 270 NW2d 511 (1978); People v Gwinn, 47 Mich App 134; 209 NW2d 297 (1973).

Finally, this Court takes, as having significance, the phrase "clearly erroneous" which is incorporated in the question initially put by the People in their brief on appeal. While it is not persuaded that the ruling of the magistrate was, at all, erroneous, the term "clearly erroneous" is not the least bit applicable to his actions. Since "clearly erroneous" is the standard by which reversals of evidence suppressions or exclusions must be justified, the

magistrate's ruling will be affirmed in this case.

/s/ Hon. Samuel C. Gardner
Judge of Recorder's Court

Dated: August 1, 1985

ORDER

At a session of said Court held in the Frank Murphy Hall of Justice at the City of Detroit, Michigan on August 1, 1985

PRESENT: HON. Samuel C. Gardner
Judge of Recorder's Court

In the above entitled cause, for the reasons set forth in the foregoing opinion;

IT IS ORDERED that the Order of the Examining Magistrate in dismissing the complaint and warrant be, and the same hereby is AFFIRMED.

/s/ HON. Samuel C. Gardner
Judge of Recorder's Court

STATE OF MICHIGAN
IN THE 36TH DISTRICT COURT
FOR THE CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN,

vs. D.C. No. 85-70206

MICHAEL MOSE CHESTERNUT,

Defendant.

PRELIMINARY EXAMINATION

BEFORE THE HON. LONGWORTH D. QUINN, JUDGE

Detroit, Michigan, Wednesday,
April 3, 1985

APPEARANCES:

MS. CAROLYN CHAPMAN
Assistant Prosecuting Attorney

On behalf of the People

MS. SUSAN ROCK
Attorney at Law

On behalf of the Defendant

M. Arlen Dreger, CSR-2509
Certified Shorthand Reporter

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(3) Detroit, Michigan
Wednesday, April 3, 1985

THE CLERK: Case Number 85-70206, The People versus Michael Mose Chesternut, charged with Knowingly and Intentionally Possessing Heroin, Codiene and Diazapam.

MS. ROCK: Good morning. Susan Rock appearing on behalf of Mr. Chesternut. At this time, Your Honor, I would like to make a Motion to Sequester any witnesses if the Prosecution has more than just one witness.

THE COURT: Any witnesses to be called for Preliminary Examination purposes are to be sequestered until they are called to testify.

KENNETH PELTIER,

having first been duly sworn by the Clerk to tell the truth, the whole truth and nothing but the truth, was examined and testified on his oath as follows:

DIRECT EXAMINATION

BY MS. CHAPMAN:

Q. Would you state your name and occupation for the record, please?

A. Kenneth Peltier, Detroit Police Officer.

Q. What division or precinct are you assigned to?

A. 15th Precinct.

Q. Were you working at the 15th Precinct on December 19, 1984?

(4)A. Yes, I was.

Q. And were you in a marked vehicle, at that time?

A. I was riding Number 15 Cruiser in plain clothes.

Q. Were you working with a partner?

A. I was working with three partners.

Q. Did you have occasion to be in the vicinity of Shoemaker and St. Clair in the City of Detroit approximately 12:30 p.m.?

A. Yes, I was.

Q. And what was your purpose being in that vicinity?

A. Routine patrol.

Q. What, if anything, did you observe while you were in that vicinity?

A. We were westbound on Shoemaker, just east of St. Clair. A Pontiac pulled to the curb--correction, an Olds, '77 Olds pulled up to the curb. The gentleman got out and walked up to another black male that was standing on the corner, Mr. Chesternut there with the blue jeans and black jacket on, standing on the corner.

Q. Mr. Chesternut was the person who was already seated--I mean standing on the corner?

A. Yes.

Q. And what happened, at that time?

A. We were proceeding west, got to the alley, maybe a half a block away. He looked in our direction and turned and (5)started running on St. Clair. We pulled around the corner. He was about halfway down the length of the apartment building there. He threw a number of packets from his pocket, right-hand pocket. He went about another five feet and just stopped.

Q. What did you do, at that point?

A. I exited the cruiser, picked up the packets, opened up some of the packets and found them to contain pills that I believed to be narcotics.

Q. You had seen pills like that before?

A. Yes, I had.

Q. When you said packets, how many pills were in the packets that you opened?

A. The one packet I opened I believe there was 25 pills in that one.

Q. And what did you do, at that point?

A. At that point, we arrested Mr. Chesternut for possession of narcotics, conveyed him to the 15th Precinct to do a custodial search at No. 15 on him, and in the hat-band of his hat I recovered another packet, a packet with Time on the outside of it and a needle, hypodermic needle.

I opened up that packet and it contained a powder that I believed to be Heroin and I also placed that in evidence.

Q. Did you place the items that you found in the tan envelopes (6) on a Lock Seal Folder?

A. Yes, I did.

Q. What about the items you found in Mr. Chesternut's hat?

A. That was also placed on evidence and in a Lock Seal Folder and conveyed to the Narcotic Section.

Q. What was the number of that Lock Seal Folder?

A. I have to refer to my report.

Q. Would you please do so.

A. Lock Seal Folder 200-630 and the Evidence Tags are 209-976 and 209-977.

Q. Now, this was 12:30 in the afternoon; is that correct?

A. Yes, it was.

Q. And the person that you had observed getting out of the vehicle, did you get that persons' name?

A. Yes, I did.

Q. And what was his name?

A. Darrel Yancy, and he was arrested for driving with no license.

MS. CHAPMAN: Thank you. I have no further questions.

BY MS. ROCK:

Q. Officer Peltier, do you specifically work in the Narcotic Section at the Detroit Police Department?

A. No, I do not.

Q. What section do you work in?

(7) A. 15th Precinct, Uniform Division.

Q. So you don't have any specific specialty?

A. What do you mean?

Q. Well, I mean some officers concentrate in the area of narcotics, some concentrate --

A. No, we are just a cruiser.

Q. Where were you positioned when you first observed the blue 1977 Olds?

A. Where was I sitting in the car?

Q. Well, not in the car but where was your car in terms of distance?

A. Maybe a block and a half away, two.

Q. A block and a half, two blocks?

A. Something like that.

Q. Why did you focus on the blue Oldsmobile?

A. I don't know.

Q. You don't know why. So ultimately you were surveilling the area where the blue Olds was?

A. No, we were just on patrol.

Q. Just on patrol. Who were your partners, Officer?

A. That day it would have been Sergeant Herman Perry, Patrolman Richard Keller and Patrolman Alan Perez.

Q. So you were the fourth officer in the car?

A. Yes.

Q. So there were four?

(8) A. Yes.

Q. Officer, is this a business or residential area?

A. That corner -- there is some vacant buildings, a party store and an apartment building on the corner that this incident happened.

Q. So there were other people in the area also along with the Defendant, Yancy?

A. Not in that immediate area, but there were people in the area, yes.

Q. How many people in the area, 20, 10?

A. I can't say.

Q. Okay. When the Defendant--you stated that the Defendant spotted you and that he ran. Were you still inside your vehicle?

A. Yes.

Q. Okay. You stated that the Defendant ran when he spotted you and that was in an unmarked vehicle or --

A. It's a cruiser. It's got markings on the door. It's black. Everyone knows what it is.

Q. Did you pursue the Defendant on foot?

A. No, we did not. Just pulled around the corner. I believe Officer Keller was driving. He just pulled around the corner, chased him with the car.

THE COURT: I'm sorry, did what?

THE WITNESS: He was running on the sidewalk and (9) my partner just pulled around the corner and started up St. Clair.

THE COURT: You say you chased with what?

THE WITNESS: We were running parallel with him.

THE COURT: Is that what you said, you chased him with the car?

THE WITNESS: Right.

Q. (By Ms. Rock, continuing) At what point did you lose sight of the Defendant?

A. Never lost sight of him.

Q. You never lost sight of the Defendant. And there were other people standing around, also, right?

A. Yes, in the general area.

Q. So the Defendant had to run through other people; is that right?

A. No, there were no other people on the corner except two of them.

Q. Where did the Defendant throw the packets at?

A. Right next to the building.

Q. On the sidewalk?

A. Yes.

Q. In the field?

A. No, on the sidewalk right next to the building.

Q. So the packets found on the Defendant was marked time?

A. That was one found in his hat in the custodial search at the (10) station.

Q. Now, the other tan packets found on the ground were not marked?

A. No.

Q. So they did not have time marked on them?

A. No.

Q. Now, how did you determine, Officer, that the pills were of a controlled substance?

A. I have seen them before.

Q. What do you mean you have seen them before?

A. I have seen them on numerous occasions and known them to be Codiene.

Q. In what instance?

A. In hospitals.

Q. In hospitals?

A. Yes.

Q. While you were working in your capacity as an Officer?

A. No, I am a Paramedic.

Q. Do the pills have any markings on them?

A. Yes, I believe those did. I think those were marked four's, which would have been Codiene, one grain of Codiene.

Q. Is that your belief or do you know that?

A. If they were four's, they would have to be. If they have four's on them, I believe they would have Codiene.

Q. The markings on the pills would have been important, in (11) your determination, as to whether they were controlled substances; is that true?

A. Yes.

MS. ROCK: I have no further questions of this witness.

MS. CHAPMAN: I don't have any.

THE COURT: Officer, what did you chase him for?

THE WITNESS: He ran, to see where he was going.

MS. CHAPMAN: Your Honor, I have discussed the matter with Defense Counsel and for Exam purposes only she has agreed to stipulate that the chemical analysis done on Lock Seal Folder 200-630 containing Evidence Tag 209-976 contained a hypodermic and a marked coin envelope stamped Time. The coin envelope was opened and contained speckled white powder. Evidence Tag 209-977 contained a coin envelope containing 11 blue tablets, number two a coin envelope containing one white tablet, number three a coin envelope containing white tablets, Tylenol No. 4 Codiene and number four, a coin envelope containing 24 white tablets.

The results of the powder weighed .25 grams and contained Heroin. B, number one was Diazapam, number two no analysis, number three Codiene and number four, no analysis and that was done by Sergeant Loren Budzinski of the Chemical analysis Unit on January 7, 1985.

THE COURT: Is that the stipulation, Counsel?

(12) MS. ROCK: Yes.

THE COURT: It is so stipulated for Exam purposes only.

Anything further?

MS. CHAPMAN: Your Honor, People move to bind over as charged in the Complaint and Warrant.

MS. ROCK: Your Honor, I'm going to have to object to the bind over.

First of all, conversing in the street is not an illegal activity and the fact that the Defendant, allegedly ran is not an indication that he is involved in any type of illegal activity that the Police should be chasing citizens of the City of Detroit in their Police cars.

THE COURT: When they're running?

MS. ROCK: I'm sorry, when what?

THE COURT: When they are running?

MS. ROCK: That's correct, Your Honor.

THE COURT: Have you heard of probable cause by foot by Assistant Prosecutor Kevin Simowski; the further they run the more probable cause the cops have got? How about that?

MS. ROCK: It's an interesting theory, Your Honor, but I don't think it's enough for there wasn't enough

probable cause to believe the Defendant was committing a (13) crime and consequently, I think any actions thereafter should be suppressed.

Further, Your Honor, the Police Officer wasn't sure or couldn't remember what the marks were on the pills which led me to believe that perhaps he wasn't -- that he assumed the fact that they were pills, that they were, in fact, a controlled substance. I don't think that's clear, here.

So I would say that the arrest, that there was an illegal arrest based on the Officer's mere hypothesis that the pills were controlled substances and based on my further arguments, I would object to the bind over.

THE COURT: Ms. Chapman?

MS. CHAPMAN: Your Honor, first of

all, the Officer, as he stated, was chasing the Defendant in the vehicle. He did not stop the Defendant until, in fact, he saw the packets.

THE COURT: That's because he couldn't catch him. They are still chasing him.

MS. CHAPMAN: Your Honor, they are in a Police car going down the street and this person is running and they were in a place that they had a perfect right to be in in terms of --

THE COURT: That would be fine until the Officer said we were chasing him in the car, otherwise I would agree (14) with you. My ears picked up when the Officer said that, you know. He said we went around. I asked him why were you chasing him in the car, why were you chasing him and he said because he was running and we wanted

to see where he was going.

MS. CHAPMAN: That's fine, but at the time they did not stop him while they were chasing him.

THE COURT: Because they couldn't catch him. Does that make a difference that they didn't catch him?

MS. CHAPMAN: Certainly.

THE COURT: You think so?

MS. CHAPMAN: Certainly. What you're saying, then, is they were making an illegal stop?

THE COURT: I don't know what they were going to do. All I know is they were chasing him.

MS. CHAPMAN: While they were chasing him on a public street, they saw what amounted to probable cause at the point that he dropped the packets, and then he stopped. They didn't stop him even after he dropped the packets, they looked in the packets, first and then they stopped him.

THE COURT: At that point they decided to do what was legal.

MS. CHAPMAN: Your Honor, there is nothing illegal about chasing a person down the street.

(15) THE COURT: Want a bet?

MS. CHAPMAN: Certainly.

THE COURT: Anything further, Ms. Chapman?

MS. CHAPMAN: No, Your Honor.

THE COURT: Let us begin by first working backwards. Going to People versus Williams, 109 Mich App 768, it deals with investigatory pursuit or any other intrusion by a police officer that occurs after the abandonment of evidence by the Defendant. That is not what we have here.

What we have here is a case that

almost falls four square with People versus Terrell, a case that is seated in the Recorder's Court by Judge George Crockett in 1977.

In People versus Terrell, the police officer observed an individual as the police officers were driving through an intersection. The Defendant saw the police officer, put his hand in his pocket, turned and ran. The officer said they then in their vehicle gave chase to the Defendant because of the gesture the Defendant made.

In this case, and in effect, they chased--the Defendant ran and they chased. In this case, the Defendant didn't give a gesture. They chased because he ran. I think that is more clearly on the Terrell situation. I do not agree, at all, with the

Prosecution; the implication if an officer sees a person who is otherwise a free American (16) running down the street they are subject to being chased by police officers. That is not the law in this State, maybe somewhere south of the Mason Dixon Line, but not the law in this State.

If it is, I feel sorry for joggers. The Court in Terrell stated the following: A police officer's pursuit and arrest of a Defendant whom the officers suspect is engaging in criminal activity is to be tested by the Fourth Amendment is general prescription against unreasonable search and seizure which should require an inquiry into whether or not the officer's action was justified or and its inception whether it was -- relates in scope to the circumstances

which justify the interference in the first place. That is, the circumstances that gave rise to the chase. There were none in this case, at all, other than the Defendant running. Exactly the situation in Terrell, except in Terrell there may well have been some argument over the fact there was a furtive gesture.

Further, the Court in Terrell, the police officer was not justified in pursuing the defendant who allegedly was standing on a street corner and puts his hand in his pocket and ran when the officer drove through the intersection in a squad car.

The officers had no specific knowledge regarding (17) the Defendant other than the furtive gesture, and it goes on then to discuss the grounds on which the suppression of the illegal contraban,(sic) the narcotics should be suppressed because of the illegal investigatory pursuit which is the decision decided by Judge Crockett in this Court and I agree with it.

I'm going to dismiss the matter for the reason cited in Terrell.

(Examination concluded.)

STATE OF MICHIGAN
COUNTY OF WAYNE SS

I, M. Arlen Dreger, Certified Shorthand Reporter, do hereby certify that I reported the proceedings of PEOPLE OF THE STATE OF MICHIGAN vs. MICHAEL MOSE CHESTERNUT, 36th District Court No. 85-70206, before the Honorable Longworth D. Quinn, Judge, and that the foregoing transcript is a full, true and accurate transcription.

/s/ M. Arlen Dreger, CSR-2509
Certified Shorthand Reporter

DATED: 5-7-85

PETITIONER'S

BRIEF

4

Supreme Court, U.S.
FILED
NOV 19 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1824

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

vs.

MICHAEL MOSE CHESTERNUT
Respondent

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED FOR REVIEW

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THE FOURTH AMENDMENT IS NOT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT NARCOTICS THROWN TO THE GROUND BY THE INDIVIDUAL DURING HIS FLIGHT MUST BE CONSIDERED ABANDONED.

II.

ASSUMING ARGUENDO THAT THE PURSUIT OF AN INDIVIDUAL BY AN OFFICER, WITHOUT MORE, CONSTITUTES A SEIZURE, INDEPENDENT OF AN ACTUAL PHYSICAL RESTRAINT, THE FLIGHT OF THE RESPONDENT UPON THE OBSERVATION OF A MARKED POLICE CAR, CONSTITUTES REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION.

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OPINIONS BELOW

The opinion of the Michigan Court of Appeals is reported as People v Michael Mose Chesternut, 157 Mich App 181 (1987) and is appended as Appendix A. (Cert. Pet. 2a). The Order of the Michigan Supreme Court is unreported and is appended as Appendix B. (Cert. Pet. 9a).

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on October 17, 1986. The Order denying an application for leave to appeal by the Michigan Supreme Court was entered on March 24, 1987. The jurisdiction of this Court is invoked under 28 USC Sec 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses,

> papers, and effects against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

The defendant was charged with knowingly and intentionally possessing Heroin, Codein and Diazapam in a complaint and warrant. On April 3, 1985 a preliminary examination was held before the Honorable Longworth D. Quinn, Judge of the 36th District Court for the City of Detroit. Kenneth Peltier testified at the preliminary examination that he is a police officer assigned to the 15th Precinct. On December 19, 1984 he was working with three partners in plain clothes and riding in Number 15 Cruiser on a routine patrol in the vicinity of Shoemaker and St. Clair. The cruiser was proceeding eastbound on Shoemaker, just east of St. Clair at approximately 12:30 p.m. when he observed a 1977 Olds pull up to the curb and a gentleman get out and walk up to a black male standing on the corner. The defendant was identified as the man standing on the street corner. The police cruiser was proceeding west, perhaps a half block away, when the defendant looked in the direction of the cruiser, turned and started running. The cruiser pulled around the corner. The defendant was about halfway down the length of the apartment building when he threw a number of packets from his right-hand pocket. He went about another five feet and just stopped. At this point the officer exited the cruiser, picked up the packets, opened up some of the packets and found them to contain pills which he believed to be narcotics, based on having seen pills like them before. There were about 25 pills in the packet which was opened. The defendant was arrested for possession of narcotics and conveyed to the 13th precinct for a custodial search which yielded a package containing powder believed to be heroin and a hypodermic needle in the hat-band of the defendant's hat. The items were placed in lock-sealed folders which for purposes of examination only were stipulated to have contained a hypodermic needle and powder weighing .25 grams of heroin. The packets contained 11 blue tablets identified as diazapam, one white tablet identified as codeine and other white tablets for which there was no

analysis. The man who was seen getting out of the car was arrested for driving without a license. On cross examination, the officer stated he did not specifically work in the narcotics section. The officer clarified the distance his police cruiser was from the 1977 Olds when he first observed it to be about a block and one half.

The officer indicated the cruiser was on a routine patrol. The area contained some vacant buildings, a party store and an apartment building. There were some people in the area, but not in the immediate area of the incident. At the time that the defendant saw the police cruiser and began running, the police were still within the car. The officer testified that he did not actually pursue the defendant on foot, they simply pulled around the corner and started up St. Clair driving parallel to him as he ran.

The court inquired if they chased him with the car and the officer replied "yes". The officer testified that at no time did he lose sight of the defendant. When the defendant tossed the packets, they were found on the sidewalk right next to the building. The officer recognized the pills to be codeine, having seen them before in hospitals and in working in the capacity of a paramedic. The Petitioner moved to bindover on the charges contained in the complaint and warrant and the Respondent interposed an objection. The Petitioner answered the objection by noting that the police did not make a stop of the defendant until he saw the packets thrown by the defendant, and it was at that point that the officers saw what amounted to probable cause. It was further noted that the officers did not stop the defendant until after the packets were retrieved and determined to be suspected narcotics. The trial court felt an empathy for otherwise law abiding joggers and thus dismissed the case based on a finding that there was an illegal investigatory pursuit.

SUMMARY OF ARGUMENT

The Michigan Court of Appeals upheld a trial court dismissal of a possession of heroin, codeine and diazapam, finding that the totality of circumstances did not provide the particularized suspicion that criminal activity was afoot so as to justify the temporary detention of the respondent, thus violating the respondent's privacy rights under the Fourth Amendment.

Petitioner contends that a "seizure" of the person occurs under the Fourth Amendment when 1) an individual, who is innocent of any crime, would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force.

The facts in this case demonstrate that there was no exercise of official authority or physical force by the police officers who simply ran after an individual who ran at the sight of them. The officers were in plain clothes, in a standard police vehicle. No questions or commands were issued by the officers, nor did they have the opportunity to provide the respondent with any identification. The police, by their conduct, did not cause any restraint of the respondent's freedom of movement.

Petitioner also submits that the Michigan Court of Appeals erred in finding that the act of abandonment was in direct response to an anticipated unjustified seizure. Petitioner contends that the respondent, through his conduct of discarding the evidence to the ground, relinquished any expectation of privacy. An individual may only assert a Fourth Amendment right if seized and searched.

Assuming that the conduct of the officers constitutes a seizure such that some level of cause is necessary to justify the pursuit, petitioner submits that unambiguous flight from an identified police officer provides sufficient articulable facts to constitute reasonable suspicion and justify the temporary detention.

ARGUMENT ONE

THE FOURTH AMENDMENT IS NOT IMPLICATED WHEN THE POLICE SIMPLY UNDERTAKE TO RUN AFTER AN INDIVIDUAL, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT INDIVIDUAL BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT NARCOTICS THROWN TO THE GROUND BY THE INDIVIDUAL DURING HIS FLIGHT MUST BE CONSIDERED ABANDONED.

A. Introduction: The Analytical Framework

In undertaking an analysis of constitutional questions, it is always wise to keep the text of the constitutional provision involved firmly in mind, to the end that one avoids engaging only in an interpretation of a previous analysis, which itself expressed a particular point of view, rather than an analysis of the Constitution, with a result which may have little relation to the actual language of the Constitution itself. As observed by Professor Nagel, in applying precedent it is sometimes necessary to struggle "against the dead weight of words to get back to the Constitution." Nagel, "The Formulaic Constitution," 84 Mich L Rev 165, 183 (1985).

Involved in this case is a seizure question. The Fourth Amendment provides in relevant part that:

> The right of the people to be secure in their persons..., against unreasonable ... seizures shall not be violated. ...

In applying this language to the facts of this case, the threshold issue, and one the decision of which might moot further inquiry, is what, indeed, is a seizure of the person? What sort of conduct must be undertaken by a governmental agent before an individual who is the object of that conduct may demand that the government justify itself by demonstrating that it acted reasonably? Though the question is fundamental, concerning the meaning of one of the operative words of the Fourth Amendment, it has, it is submitted, never been answered definitively by the Court; moreover, the Michigan courts have

supplied an answer inconsistent with the text of the Constitution.

Nowhere in the Fourth Amendment does one find the term "arrest"; the Fourth Amendment governs "seizures", including those of the person. This Court has made plain that encounters between citizens and police officers vary in kind and degree, and that not all encounters involve the Fourth Amendment:

> The Fourth Amendment does not proscribe all contact between the police and citizens, but is designed "to prevent arbitrary and oppressive interference by law enforcement officials with the privacy and personal security of individuals". United States v Martinez-Fuerte, 428 U.S. 543,554 (1976)...As we have noted elsewhere, **"Obviously, not all personal intercourse between policemen and citizens involves a 'seizure' of the person. Only when the officer by means of physical force or show of authority, has restrained the liberty of a citizen may we conclude that a 'seizure' has occurred."** Terry v Ohio, 392 U.S. 1,19, n. 16... (emphasis supplied).
>
> Immigration and Naturalization Service v Delgado, 466 US 210; 104 S Ct 1758: 80 L Ed 2d 247 (1984).

A majority of this Court has adopted the "formula" proffered by Justice Stewart in United States v Mendenhall, 446 US 544; 100 S Ct 1870; 64 L Ed 2d 497 (1980) and refined by Justice White in Florida v Royer, 460 US 491; 103 S Ct 1319; 75 L Ed 2d 229 (1983) as a standard by which police-citizen encounters may be assessed. Florida v Royer, 460 US at 498-501 (1983); I.N.S v Delgado, 104 S Ct at 1769. While each case of course turns on its own facts, this Court has recognized the need to establish "categories" of police-citizen encounters to aid in the analytical inquiry. Three generic classes of police-citizen contact have evolved. First, a consensual encounter wherein an officer merely approaches an individual on the street or in another public place, asks him if he is willing to answer some questions, and puts the questions to the person if he is willing

to answer. The person approached need not answer any questions put to him; indeed, he may decline to listen at all and may go on his way. Terry v Ohio, 392 US at 32-33; Florida v Royer, 460 US at 497-498. The individual may not be detained, even momentarily, without reasonable, objective grounds for doing so, and his refusal to listen or answer does not, without more, provide those grounds. But "If there is no detention-no seizure within the meaning of the Fourth Amendment- then no constitutional rights have been infringed." Florida v Royer, 460 US at 499.

The second class permits the "limited intrusion of the personal security" of a person detained based on articulable suspicion not amounting to probable cause and justified by substantial law enforcement interests (e.g. investigative stops). Michigan v Summers, 452 US 692,699 (1981).

The third class is the time honored probable cause based arrest to hold the individual for a crime charged against him. Dunaway v New York, 442 US 200,207-9 (1979).

The Michigan Supreme Court in People v Shabaz, 424 Mich 42 (1985), the case deemed controlling by the Michigan Court of Appeals in the instant case, drew from Royer, characterized these classes as "tiers", and adopted the analysis in its application to that case. The majority found no application of the first tier to what Michigan courts have called "investigatory pursuit": "Plainly, the police encounter with the defendant in this case was not at either the first or third tier of the Royer analysis." People v Shabaz, 424 Mich 42, 58 (1985). The dissenting justices found that as a matter of law a forcible stop triggering the Fourth Amendment has not occurred while a pursuit is in progress:

> I would conclude that on this record there was not an intrusion on protected interests sufficient to constitute a stop. While the reasonable belief of an individual actually stopped by the police is relevant to whether a seizure has occurred, the threshold issue, whether there has been a "stop", is one of law. I would find on this record that one individual running after another is, as a matter of law, not a detention for investigation. 424 Mich 71.

It is submitted that the Shabaz dissent properly interprets the term "seizure", and that the application of that view to the facts here demonstrates that there was no seizure so as to trigger the Fourth Amendment. It is the position of the Petitioner that a "seizure" of the person has occurred under the Fourth Amendment when either 1) an individual, who is innocent of any crime, would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity, and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force. In the instant case, neither occurred before the time Respondent abandoned his narcotics.

B. A Seizure Is A Seizure Is A Seizure:[1] One May Only Litigate That Which Happened To Him

A survey of the lead cases wherein a "seizure" is considered demonstrates that often the determination is "fact bound", turning heavily on assessments of credibility and the possibility of subtle influences from the circumstances, but in all these cases the question involved is whether an individual who **has** refrained from going on his way did so because of an objectively reasonable perception of an official exercise of authority or show

of force. Whether the individual in fact refrained from going on his way (or was physically prevented from doing so), is not, however, ordinarily a subtle factual question, but, as indicated by Justice Boyle, readily ascertainable. This Court has never intimated that an individual who has gone on his way may nonetheless be considered "seized."

The seminal decision in recognizing a distinction, for Fourth Amendment purposes, between an encounter which constitutes a seizure and that permissible contact which does not is, of course, Terry v Ohio. In Terry, a plainclothes police officer of thirty nine years experience observed what he believed to be criminal activity in the making. The officer observed the defendant in the company of two others for a period of time, then approached him, identified himself as a police officer and asked the men for their names. "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed the petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing." Terry v Ohio, 392 US at 7; United States v Mendenhall, 446 US at 553. The Terry Court "assume[d] that up to that point [before the officer had physically restrained Terry for the purpose of searching for weapons] no intrusion upon constitutionally protected rights had occurred." 392 US at 19 n. 16. This Court in Mendenhall stated that this assumption was entirely correct:

---

[1] Gertrude Stein from Sacred Emily, "Rose is a rose is a rose is a rose."

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of the circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating the compliance with the officer's request might be compelled. See Terry v Ohio, supra, 392 U.S. at 19, n.16, 88 S. Ct., at 1879, n.16; Dunaway v New York, 442 U.S. 200.297, and n.6, 99 S. Ct. 2248,2253, 60 L. Ed. 2d 824; 3 W. Lafave, Search and Seizure 53-55 (1978). In the absence of some such evidence, otherwise inoffensive contact between a member of the public and the police **cannot, as a matter of law, amount to a seizure** (emphasis added).
>
> United States v Mendenhall, 446 US at 555.

Mendenhall also referred to Sibron v New York, 392 US 40 (1968), the companion case to Terry, where the Court did not decide the issue of whether a "seizure" had occurred when a uniformed police officer approached the petitioner in a restaurant, told him to come outside, and he complied. The Sibron Court indicated the record "was barren of any indication whether Sibron accompanied [the Patrol man] outside in submission to a show of force or authority which left him no choice, or whether he went voluntarily in a spirit of apparent cooperation with the officer's investigation." Sibron v New York, 392 US at 63. Mendenhall notes that "Plainly, in the latter event, there was no seizure until the police officer in some way demonstrably curtailed Sibron's liberty" (emphasis added). United States v Mendenhall, 446 US at 554.

The task of distilling a working definition of "seizure", in situations where the individual has refrained from going on his way, was undertaken by Justice Stewart in Mendenhall, and although he failed to command a majority of Justices in the opinion, the standard he proferred is now embraced by a majority of this Court. Justices Stewart and Rehnquist concluded that a person is "seized only when, by means of physical force or a show of authority, his freedom

of movement is restrained.... and if, in view of all the surrounding circumstances, a reasonable person would have believed that he was not free to leave." United States v Mendenhall, 446 US at 554-555. The facts as found by the Court did not support the finding that a "seizure" had taken place under this test, not because the individual did not in fact stay, but because that response was not viewed as compelled by any conduct of the officers:

> On the facts of this case, no "seizure" of the respondent occurred. The events took place in the public concourse. The agents wore no uniforms and displayed no weapons. They did not summon the respondent to their presence, but instead approached her and identified themselves as federal agents. They requested, but did not demand to see the respondent's identification and ticket. Such conduct without more, did not amount to an intrusion upon any constitutionally protected interest. The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and

> posed a few questions. Nor was it enough to establish a seizure that the person asking the questions was a law enforcement official.... In short, nothing in the record suggests that the respondent had any objective reason to believe that she was not free to end the conversation in the concourse and proceed on her way, and for that reason we conclude that the agent's initial approach to her was not a seizure.
>
> United States v Mendenhall, 446 US at 1877-1878

In Florida v Royer, another case involving the reasonable perceptions of an individual in response to an encounter with government officials, this Court divided as to the application of a seizure standard to the facts, but a fair reading of the opinion discerns a majority approach to the "seizure" standard, consistent with the approach taken in Mendenhall. It must be observed that in neither Royer nor Mendenhall was a restraint of liberty achieved by the application of physical force to the person of the individual--the question in each case, at least initially, involved official conduct and reasonable perceptions of that conduct by individuals who did not attempt to go on their way. Similarly, in the airport stop genre of cases, this Court has recently reaffirmed the application of the Mendenhall-Royer standard of a "seizure". Drawing from the Mendenhall standard, the Court in Florida v Rodriguez, infra, recognized that an initial contact between officers and citizens, where the citizens were simply asked if they would listen to the officers' questions, was clearly the type of consensual encounter that implicates no Fourth Amendment interest. Florida v Rodriguez, __US__; 105 S Ct 308; 83 LEd 2d 165 (1984). None of these cases suggests in any way that an individual who has gone on his way may contest the authority of the police to stop him.

In a different context, a factory survey setting, this Court, speaking through Justice Rehnquist, recently applied the Mendenhall-Royer standard to determine if the Fourth Amendment is implicated by the questioning of a citizen by police officials. The Court noted that while it is true that most people will respond to a question propounded by the police, this fact does not render the encounter any less consensual:

> Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps - such as those taken in Brown - to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure (citations omitted; emphasis added).

I.N.S. v Delgado, 104 S Ct at 1763.

The Delgado Court found that the positioning of identifiable Immigration

agents who wore badges, carried walkie-talkies, and were armed, at the exits and on the premises of a private factory, and who approached employees and asked for identification, did not constitute a seizure of the work force, nor did the addressing of citizenship questions constitute a seizure of the person. The Court noted that though if any person had attempted to evade the questioning by attempting to leave the premises those persons might have been detained by the I.N.S. officials, no such claim was made as to the rights of the respondents before the Court, as the respondents answered the questions and went on their way. The Court also noted the mere fact that a person may have been questioned if he attempted to leave did not create a reasonable apprehension of detention or seizure. 104 S Ct at 1764.

From a survey of the cases from this Court one may discern a standard by which courts may adjudge whether the police-citizen encounter in question implicates the Fourth Amendment. In these cases an encounter of some sort has in fact occurred, and the courts are obliged to characterize the encounter, and determine if an appropriate level of cause has been met, if one needs to be met under the circumstances. In the instant case the factual predicate to a determination of the presence or absence of an appropriate level of cause - the existence of a stop or detention - is missing. As the dissenting justices in People v Shabaz cogently argued, as a matter of law, one individual running after another does not constitute a seizure under the text of the Fourth Amendment. People v Shabaz, 424 Mich at 71. Petitioner submits that when police simply undertake to run after an individual who runs at the sight of police officers, no actual restraint of freedom of movement of that individual

has occurred. A seizure is a detention. If there has been no detention, there has been no seizure.

While it is true that there can be a brief encounter which is not a "seizure", it is not true that there can be a seizure without the loss of the freedom of locomotion, achieved against the will of the individual. Even if some exercise of official authority or show of force is made, such that a reasonable person would have believed that he is not free to leave with impunity, if the person chooses not to acquiesce, but to attempt to avoid the detention, then he is not seized until he is actually physically restrained. The issue of whether appropriate cause existed for the seizure is simply not subject to litigation unless and until a seizure occurs. If the individual acquiesces, he may complain; if he chooses not to acquiesce, but to attempt to avoid the detention, he may not litigate whether his seizure was justified until he was in fact physically restrained. He cannot complain that during a period of flight he was illegally detained, or that he believed an illegal detention was imminent. Any action he undertakes in the interim, such as throwing narcotics to the ground, is not subject to litigation, as the Fourth Amendment is not triggered until the seizure occurs. Any argument that if the individual would have acquiesced, the police would have detained him, and having detained him would also have searched him, and did not have cause, is speculative. As the Delgado Court held: individuals "may only litigate that which happened to them" (emphasis added). I.N.S. v Delgado, 104 S Ct 1765.

This Court in Delgado rejected the claim that positioning agents by the door of a factory manifested an intent to detain such that a reasonable person

would believe he would be detained if he did not give truthful answers to otherwise proper questions put to him.

> Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents actually did .... Likewise, the mere possibility that they would be questioned if they sought to leave the buildings should not have resulted in a reasonable apprehension by any of them that they would be seized or detained in any meaningful way (emphasis added).

I.N.S. v Delgado, 104 S Ct 1763-64

This rule does not encourage police misconduct. The notion that the police will attempt to seize individuals without appropriate cause in the hope that they will flee, and while fleeing discard contraband or weapons, is beyond serious consideration. An individual who flees may only assert a Fourth Amendment right if caught; it makes no sense to allow him to raise a constitutional challenge or complain if he makes good his escape.

The standard submitted herein, then, is that a "seizure" of the person has occurred under the Fourth Amendment when either 1) an individual, who is innocent of any crime,[2] would reasonably believe, due to an exercise of official authority or a show of force, that he is not free to go on his way with impunity, and acquiesces to the exercise of official authority or show of force, or 2) an individual is actually physically restrained by the exercise of physical force. This standard has the analytical advantage of a "cause and effect" determination. If the police undertake to cause the restraint of an individual's freedom of movement, either by actual physical restraint or by the show of authority or show of force, and effect that restraint upon the freedom of movement, either by acquiescence to the exercise of authority or show of force, or by the application of physical force to the person of the individual, then a seizure has occurred, and the Fourth Amendment is triggered so as to require an appropriate showing of cause. But until there is an effect - a deprivation of the freedom of locomotion - there is no basis to examine for causes and justifications.

C. Lower Court Dispositions

Several state court opinions warrant inspection, as, in Petitioner's view, they represent, along with the opinion of the majority of the Michigan Supreme Court in Shabaz, and the Court of Appeals in this case, a misapprehension of the term "seizure". The Louisiana Supreme Court found an impermissible seizure when police officers, having observed an unknown woman exiting a known narcotics address, pulled along side her, observed her place something in her waistband, and turn and walk back toward the address, prompting the officers to "spring" from their car and overtake her as she was withdrawing glassine envelopes containing heroin. The Court found that the officers could not approach the individual under conditions where a detention is imminent without reasonable suspicion or probable cause. Three Justices dissented, one finding the facts amounted to probable cause, one finding reasonable suspicion, and the final Justice finding that no "stop" occurred. "To turn and

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[2] United States v Wylie, 569 F 2d 62,68 (D.C.Cir. 1977); United States v Pajari, 715 F 2d 1378, 1381 (CA 8, 1983). The reasonable person who acquiesces to a police officer's on the street encounter which is not attended by physical force or a show of authority, has not been "seized". The reasonable person who acquiesces to the police officer's physical force or show of authority has been "seized" for Fourth Amendment purposes. Gomez v Turner, 672 F 2d 134, 141 (D.C. Cir. 1982); United States v Berry, 670 F 2d 583 (CA 5, 1982); United States v Elmore, 595 F 2d 1035 (CA 5, 1979).

flee simply because she saw the police car approaching is not due to police action. This conduct, instead, is a spontaneous manifestation of guilt." State v Saia, 302 So 2d 869,877 (1974). Petitioner submits that this latter view affords the proper analysis.

The Massachusetts Supreme Court has found that a pursuit designed to effect a stop is impermissible under the Fourth Amendment, absent appropriate cause, holding that the stop starts when the pursuit begins. The Court noted that the pursuit of the bicycle rider in that case was conducted by several police cars, marked and unmarked, with sirens blaring, and the stop was effected by the officers reaching from the car, grabbing the defendant from his bike, and throwing the defendant across the hood of the cruiser, whereupon two manila envelopes containing controlled substances were discovered. The Court failed to note that the police conduct in that case did not precipitate the flight, and that the individual's freedom of movement was not infringed upon until such time as the act of grabbing the defendant took place, at which time the contraband was discovered. There was no need to discuss the legal effect of the "pursuit", and consistent with the previous analysis it is here submitted that the dicta in the opinion is without a sound foundation in law.

D. The Instant Case

The facts of the instant case do not implicate the ultimate component of the proposed seizure standard, as prior to the abandonment of the narcotics, no restraint on respondent's freedom of movement had been accomplished, whatever the desires of the police or the perceptions of the Respondent. There was no effect; thus, there is no need to examine for causes or justifications.

Moreover, in this case the first component of the standard was not met, as the officers did not exercise any show of official authority or force, nor did they physically restrain Respondent by the application of physical force to his person (before the narcotics were abandoned). The officers were in a marked standard police vehicle. (Cert. Pet. 3a). No questions or commands were issued by the officers. (J.A. 15). The police, by their conduct, did not cause any restraint upon the Respondent's freedom of movement, nor cause his flight. Moreover, the Respondent did not manifest a reasonable belief that he was not free to walk or run away, nor acquiesce to any perceived police conduct. The Respondent broke into a run, attempting to elude the police, though the police had done nothing to trigger the flight. The Michigan opinions on the subject run afoul of the Delgado teaching by engaging in a speculative analysis that "If he [the respondent] stopped running, he would not have been free to leave. Events proved that," People v Shabaz, 424 Mich at 66, thus allowing individuals to litigate other than "that which happened to them." Such an observation in fact argues that until Respondent stopped running he was in fact free to leave (was not detained), and he did exactly that "at flank speed". The dissent in the Michigan Supreme Court in Shabaz properly found "that the Respondent's flight prevented any request for an explanation of [the respondent's] behavior"; therefore, there was not even a "stop" or "forcible stop" so as to trigger the Fourth Amendment.

The facts in this case demonstrate that there was no seizure of the person by the official show of authority or physical force. The abandonment of the narcotics by Respondent and its recovery

by the police thus raises no question under the Fourth Amendment.

E. "Anticipatory Abandonment"

The Michigan Court of Appeals, relying on Shabaz, held that the Respondent's abandonment of the narcotics was in direct response to an anticipated unjustifiable seizure (note that it will be argued subsequently that the police did have a reasonable suspicion under the facts of this case, so that a stop was justified). People v Shabaz, 424 Mich at 66. The Court did not discern a difference between the seizure of the person and a possible subsequent search. Consistent with the Petitioner's approach that a seizure does not occur until there is a restraint of movement, it is submitted that the search, the conduct attributable to the police from which the disclosure of evidence springs, does not occur until the seizure is effected and the search takes place. It is an unwarranted extrapolation of logic to assume that an individual, who has run at the sight of police officers, reasonably believes that the pursuit constitutes an illegal seizure, which will precipitate an illegal search of the person as well. Properly viewed, there is no such thing as an "anticipatory abandonment".

The Florida Supreme Court made this factual and legal distinction in a case wherein it was found that the initial stop was without justification; however, the act of abandonment was not a product of the illegal stop.

> Fundamental Fourth Amendment interests as well as sound logic support the prevailing case law in this subject. Until the actual police search has begun, it cannot be assumed that the police will search a person whom they have temporarily stopped on the street or that they will search such a person's car or other personal belongings. Not every temporary detention necessitates such action.... As a consequence, a person's abandonment of the property subsequent to an illegal police stop can hardly be considered the product of the stop.
>
> State v Oliver, 368 So 2d 1331 (Fla. App. 1979).

Consistent with the Florida approach, the Eleventh Circuit has found a voluntary abandonment in the face of allegedly improper police activity by employing a cause and effect analysis. In rejecting the factual claim that the defendant had abandoned suitcases in a backyard in light of an illegal police entry and search of his home, the Court noted the abandonment took place prior to the entry. The Court continued on to find that whatever illegality may have resulted from the search and seizure of the bags was attenuated by the voluntary abandonment. United States v Pirolli, 673 F 2d 1200, 1204 (CA 11, 1982) [citing United States v Colbert, 474 F 2d 174 (CA 5, 1973), recognizing that the illegality of an illegal stop or arrest may be attenuated by a voluntary abandonment]. As noted previously, this rule does not invite police misconduct in this context, as the notion that the police will attempt to seize individuals without appropriate cause in the hope that they will flee, and while fleeing discard contraband or weapons, is beyond serious consideration. An individual may only assert a Fourth Amendment right if seized and searched. Respondent here chose to relinquish his possession of the narcotics and they were properly recovered by the police. See 1 LaFave, Search and Seizure, Sec. 2.6, pp. 366-368; City of St. Paul v Vaughn, 237 NW 2d 365 (1975); United States v Kendall, 655 F 2d 199 (CA 9, 1981), cert den 455 US 941.

ARGUMENT TWO

ASSUMING ARGUENDO THAT THE PURSUIT OF AN INDIVIDUAL BY AN OFFICER, WITHOUT MORE, CONSTITUTES A SEIZURE, INDEPENDENT OF AN ACTUAL PHYSICAL RESTRAINT, THE FLIGHT OF THE RESPONDENT UPON THE OBSERVATION OF A MARKED POLICE CAR, CONSTITUTES REASONABLE SUSPICION FOR AN INVESTIGATIVE DETENTION.

Reasonableness is the touchstone of Fourth Amendment analysis, and the scope of a particular intrusion by agents of the public upon the personal security of individuals is a central element of the reasonableness analysis. In the creation of the Terry class of "seizure", a balance was struck between the minimal nature of the intrusion upon the privacy rights of the individual and the governmental interest in preventing criminal activity. Reasonable suspicion of criminal activity warrants a temporary detention for purposes of questioning limited to the purpose of the stop. *United States* v *Brignoni-Ponce*, 422 US 873, 881-2 (1975); *Florida* v *Royer*, 460 US at 499.

In balancing the interests, the *Royer* Court dispelled any doubt that the public's interest in the suppression of illegal drug transactions or other serious crimes is a weighty concern which will warrant a temporary detention. 460 US at 500. In justifying the minimally intrusive *Terry* stop, the officer must have an objective justification or reasonable suspicion that an individual is involved in criminal activity. *Brown* v *Texas*, 443 US 47,51 (1979); *Terry* v *Ohio*, 392 US at 21. The reasonable suspicion is an aggregate of specific articulable facts, together with rational inferences from those facts. *United States* v *Brignoni- Ponce*, 422 US at 884.

> Courts have used a variety of terms to capture the elusive concept of

> what cause is sufficient to authorize police to stop a person. Terms like "articulable reason" and "founded suspicion" are not self-defining; they fall short of providing clear guidance of the myriad factual situations that arise. But the essence of all that has been written is that the totality of circumstances - the whole picture - must be taken into account. Based upon the whole picture, the detaining officer must have a particularized and objective basis for suspecting the particular person stopped of criminal activity. [cites omitted]
>
> The idea that the assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First, the assessment must be based upon all the circumstances. The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and makes deductions-inferences and deductions that might well elude an untrained person.
>
> *United States* v *Cortez*, 449 US 411,417 (1981).

It is submitted that when identifiable police officers observe an individual flee at the sight of them, a stop of the individual to attempt to determine the reason for this conduct is reasonable; indeed, for the officers to shrug their shoulders, perhaps remarking to one another regarding this curious event before going on their way, would be an unreasonable response in dereliction of their duties. In Peters, the companion case to Sibron, an unidentified police officer observed a stranger and his companion tiptoeing in the hallway of his apartment building, and who fled at his approach. This Court recognized that flight and deliberately furtive actions at the approach of strangers or law enforcement officers yields "a strong indicia of mens rea." Sibron v New York, 392 US at 66; United States v Sharpe, 470 US 675; 105 S Ct 1568; 84 L Ed 2d 605 (1985); United States v Brignoni-Ponce, 422 US at 885.

The United States Court of Appeals for the Sixth Circuit has concluded that flight in the face of a clear showing of lawful authority supplies police officers with reasonable suspicion that criminal activity may be afoot. "Flight invites pursuit and colors conduct which hitherto has appeared innocent". United States v Pope, 561 F. 2d 663,668 (CA 6, 1977). The defendant in Pope was approached by an airport agent who displayed his credentials and attempted to stop the defendant. The Court found that in running from the agent the defendant had not conducted himself as an innocent passerby and thus provided reasonable suspicion to effect the investigative stop. The Court made specific reference to Wong Sun v United States, 371 U.S. 471, 482-4; 83 S. Ct. 407; 9 L. Ed.2d 441 (1962) wherein this Court found flight from an agent who had misrepresented his purpose for entry into the defendant's home to have been ambiguous under the circumstances. The Court in Wong Sun thus opined that the defendant's flight "signified guilty knowledge no more clearly than did the natural desire to repel an apparently unauthorized intrusion." 561 F 2d at 669 fn 6. It is significant to note that the Court in Wong Sun found that the ambiguous flight did not support a finding of probable cause to justify the arrest, as distinguished from a reasonable suspicion determination to support an arguable stop.

The United States Court of Appeals for the Fifth Circuit has adopted the Pope rationale and has held that flight is a "key ingredient justifying the decision of a law enforcement officer to take action". United States v Bowles, 625 F 2d 526, 535 (CA 5, 1980). The Fifth Circuit "factored flight in its reasonable suspicion calculus" in cases wherein the

authority of the pursuer was not readily ascertainable as well as cases wherein the officer's authority was identifiable. 625 F 2d at 535 fn 12. It is clear that officers are not required to rule out all possibility of innocent behavior before initiating a reasonable suspicion based stop. United States v Holland, 510 F 2d 453, 459 (CA 2, 1975).

The Michigan Court of Appeals in applying the Michigan precedent of People v Shabaz, supra, found that the flight, in and of itself, from an identified police officer did not supply reasonable suspicion to justify a Terry-type investigation. (Cert. Pet. 3a). Michigan drew from authority which addressed the weight that flight would be assessed in a probable cause determination. United States v Green, 670 F 2d 1148, 1152 (D.C. 1981).

The instant inquiry does not address the circumstances sufficient to establish probable cause; rather, the instant case addresses the impact of the flight from an identified police officer in determining reasonable suspicion.[3] The Michigan authority is not persuasive nor controlling upon the issue at hand. The cases are legion wherein flight is a factor taken in the aggregate for a reasonable suspicion determination.[4]

---

[3] Justice Brennan properly noted that flight could elevate reasonable suspicion into probable cause. It is submitted that unambiguous flight can, in and of itself, establish reasonable suspicion. United States v Sharpe, 470 US 675; 705; 105 S Ct 1568; 84 L Ed 2d 605 (1986).

[4] LaFave, Search and Seizure Sec 9.3(c) fn 150-2. See also cases collected wherein Professor La Fave characterizes the interchange or avoidance of the police officer by the citizen as something more than a minor misstep. La Fave supra Fn. 162-4.

CONCLUSION

In the instant case the officers were in a marked police vehicle, and the Michigan Court of Appeals found that the Respondent began to run upon sighting the marked police car. The Michigan Court found that the pursuit of the Respondent was not justified by reasonable suspicion, and that the abandonment of the drugs was the unlawful fruit of the improper pursuit. For the reason that the Fourth Amendment proscription against unreasonable searches and seizures is not implicated until there has been a seizure of the person, and for the reason that the Fourth Amendment proscription against unreasonable searches and seizures is not implicated until there has been a search, and for the reason that reasonable suspicion to conduct an investigatory stop did exist, the Michigan Court of Appeals should be reversed.

Respectfully submitted,

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RESPONDENT'S

BRIEF

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No. 86-1824

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF MICHIGAN, *Petitioner*,

v.

MICHAEL MOSE CHESTERNUT

On Writ Of Certiorari
To The Court Of Appeals Of Michigan

BRIEF OF RESPONDENT

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether a police chase by four officers in a marked police cruiser of an individual who is running on foot is a show of authority which would convey to a reasonable person that he is not free to leave such that a Fourth Amendment seizure has occurred. *United States* v. *Mendenhall*, 446 U.S. 544 (1980); *Florida* v. *Royer*, 460 U.S. 491 (1983).

2. Whether flight alone, unaccompanied by any objective factor suggesting that an individual is engaged in criminal activity, can give rise to a reasonable and articulable suspicion sufficient to justify a seizure under the Fourth Amendment.

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STATEMENT OF THE CASE

At half past noon on December 19, 1984, Respondent Michael Chesternut was standing on the corner of St. Clair and Shoemaker streets in the City of Detroit when another man, a Mr. Darrel Yancy, drove up in an Oldsmobile, got out and walked up to Mr. Chesternut (J.A. 14). There is nothing in the record to suggest that this neighborhood was a high crime area or an area in which there had been reports of drug activity. There was also no testimony of any complaint involving Mr. Chesternut, Mr. Yancy or anyone fitting the description of these gentlemen, nor was there testimony of any complaint as to the Oldsmobile (J.A. 19).

During the course of Mr. Chesternut's meeting with Mr. Yancy, a black marked Detroit police cruiser carrying four officers approached the intersection (J.A. 15, 21). These officers were on patrol and they had no special assignment that day (J.A. 19). There was no testimony that any of the officers observed any evidence of a crime being committed, any furtive gestures by Mr. Chesternut or Mr. Yancy or any suspicious activity as they approached the corner.

When the officers were about one-half block away from the intersection, Mr. Chesternut left the corner, running up St. Clair (J.A. 15). The only officer who testified asserted that Mr. Chesternut had looked at the cruiser before beginning to run (J.A. 15). When Mr. Chesternut began to run, the four officers "*chased* him with the car" (J.A. 21). According to the officer who testified, they chased Mr. Chesternut merely because he ran (J.A. 21). The cruiser accelerated[1] around the corner and proceeded up St. Clair after Mr. Chesternut where it quickly overtook him. The officer claimed that at the point when they had come closest to him—when the cruiser was "running parallel" with Mr. Chesternut—he allegedly removed several packets from his right hand pocket, discarded them, and stopped promptly within the space of about five feet (J.A. 15, 21). The packets were seized by police and Mr. Chesternut was arrested for possession of a suspected controlled substance (J.A. 15-16). A subsequent search of Mr. Chesternut revealed a further packet and a hypodermic needle in his hatband (J.A. 16).

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[1] The cruiser's speed can be inferred both from the officer's description of a "chase" and from the following logistics. The cruiser travelled

Mr. Chesternut was charged with possession of heroin, codeine and diazepam (J.A. 12). At preliminary examination, his motion to suppress the evidence and to dismiss the charges was granted by the district court based upon a finding that there had been an illegal investigatory pursuit (J.A. 31-35). That ruling was subsequently affirmed by the trial court (J.A. 2-10) and by the Michigan Court of Appeals (Pet. App. 2a-8a). On March 24, 1987, the Michigan Supreme Court denied prosecutor-petitioner's application for leave to appeal (Pet. App. 9a-10a).

SUMMARY OF ARGUMENT

A police chase by four officers in a marked police cruiser of an individual who is travelling on foot is a show of authority which would convey to the reasonable person that he is not free to leave. Under these circumstances, a second tier seizure has occurred under the Fourth Amendment. *Florida* v. *Royer*, 460 U.S. 491 (1983); *United States* v. *Mendenhall*, 446 U.S. 544 (1980).

The Fourth Amendment confers on the individual, as against government, the right to be let alone. When police officers chase an individual absent any particularized or objective basis for suspecting that he is engaged in criminal activity, they invade his constitutional right to privacy. A vehicular police chase of a pedestrian also violates the right to personal security because it communicates to the individual that detention is intended and imminent. A person chased by the police would reasonably expect that in effecting his capture, the police will resort to physical force if necessary, and consequently the police chase threatens physical injury. Moreover, a police chase interferes with an individual's freedom of movement and restrains him from going about his private affairs.

While these officers had a right to approach Mr. Chesternut and to seek his cooperation, he in turn had a right to ignore them and to go on his way. When he decided to exercise that right by running from the street corner, they took additional steps conveying to him in an intimidating manner that he would not be allowed to leave. Alone and on foot, Mr. Chesternut was chased by four officers in a black marked police cruiser. These police officers targeted him, converged, on him and overtook him by "running parallel" with him, placing him between their vehicle and the apartment structure.

This police chase transcended the first tier questioning encounter which occurred in *Mendenhall* because by running away from police, Mr. Chesternut was opting not to

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a distance of one-half block westbound on Shoemaker, maneuvered a right turn, and then travelled northbound half the length of the apartment building on St. Clair in the same amount of time that it took Mr. Chesternut to run from the street corner to the middle of the apartment building on St. Clair (J.A. 15). Put simply, the officers covered more than twice the ground as Mr. Chesternut in the same amount of time, and he was running. Moreover, the officers allegedly never lost sight of Chesternut despite the fact that there were buildings at that corner (J.A. 20-21).

be questioned, and by chasing him the officers failed to respect that choice. Moreover, chasing by a police officer is inherently more intimidating than mere questioning because a chase conveys an implicit accusation of criminal activity.

A police chase is also plainly distinguishable from police surveillance or simple following. The act of following is unobtrusive investigation by observation. By contrast, the act of chasing is aggressive and obvious. It communicates to the person being chased that detention is intended and it is imminent.

Petitioner urges this Court to exclude all but literal detentions from the ambit of the Fourth Amendment. This Court, however, has consistently refused to place an unduly literal construction on those constitutional provisions which safeguard the security of the person. Moreover, since *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court has recognized that without some active control by the judiciary, the street officer may abuse his discretion in police-citizen confrontations and hence the Court has adhered to the touchstone requirement of reasonable suspicion.

As a matter of policy, in circumstances where, absent reasonable suspicion, police officers would be forbidden from detaining the individual, they should also be discouraged from achieving the same end through the compulsion of a chase. Moreover, police officers should not be encouraged to escalate a situation by chasing in the hope of inducing "suspicious" behavior.

Law enforcement's justification for chasing in this situation is highly questionable and as such it does not offset the intrusion that a chase entails. These officers were on routine patrol and thus their activities were not directed at any particular law enforcement problem. The officers' "need" to chase is plainly belied by their stated objective: "to see where [Chesternut] was going." By following rather than chasing Mr. Chesternut, these officers could have achieved this end without violating his rights.

In addition to the individual intrusion, society pays a heavy price for the random police chase including community resentment toward police and the obvious danger a chase imposes on the participants and innocent bystanders as well.

The Fourth Amendment intrusion in this case was not justified by a particularized and objective basis for suspecting Mr. Chesternut of criminal activity. Prior to the chase, these officers had no information concerning Mr. Chesternut, Mr. Yancy or the Oldsmobile parked at the corner. They did not claim to be investigating a crime involving persons resembling either of these gentlemen. There was no indication that this was a high crime area or an area in which drug activity was prevalent. Prior to his departure from the corner, the officers did not observe Mr. Chesternut do anything suspicious or furtive, or anything even remotely related to criminal activity.

The only factor relied on by the officers to justify this chase is flight. Flight, however, is not a reliable indicator of guilt without other circumstances making its import less ambiguous. A person may be motivated to flee from police out of an ingrained fear or dislike of authority, an exaggerated fear of police brutality or harassment, a fear of being apprehended mistakenly as the guilty party, an unwillingness to appear as a witness, or other legitimate personal reasons. While in some situations flight may combine with other suspicious or furtive circumstances to give an officer a particularized and objective basis for suspecting the person of criminal activity, flight alone does not give rise to a reasonable suspicion. Moreover, if running away in and of itself constitutes reasonable suspicion, then every police chase would be deemed a reasonable seizure because the police chase invariably involves someone running away. Thus any protection this Court decides to confer in answering the first question would be rendered meaningless.

Mr. Chesternut's alleged discarding of contraband was the coerced product of illegal police activity. If Mr. Chesternut discarded the packets during the chase as claimed by the officer, then the abandonment occurred while he was being seized and there were no intervening circumstances to dissipate the taint of the unlawful invasion.

ARGUMENT

I. A POLICE CHASE BY FOUR OFFICERS IN A MARKED POLICE CRUISER OF AN INDIVIDUAL WHO IS RUNNING ON FOOT IS A SHOW OF AUTHORITY WHICH WOULD CONVEY TO A REASONABLE PERSON THAT HE IS NOT FREE TO LEAVE SUCH THAT A FOURTH AMENDMENT SEIZURE HAS OCCURRED.

A. A Police Chase of an Individual Implicates Two Fundamental Interests Protected Under the Fourth Amendment, the Right to Privacy and the Right to Personal Security.

The Fourth Amendment confers upon every individual the dual rights of personal security and privacy free from arbitrary interference by law officers. These two distinct guarantees are at stake when police officers chase a citizen who has chosen to leave their presence.

Regarding an individual's right to privacy, Justice Brandeis noted in *Olmstead* v. *United States*, 277 U.S. 438, 478-479 (1928) (Brandeis, J., dissenting).

> [the makers of our Constitution] conferred, as against the Government, the right to be let alone - the most comprehensive of rights and the right most valued by civilized men. To protect that right, every unjustifiable intrusion by the Government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

The Fourth and Fifth Amendments work in tandem to protect the right of privacy, for a person must be protected both from the unlawful seizure of evidence and from being compelled to give up the same as witness against himself. *Boyd* v. *United States*, 116 U.S. 616, 630 (1885); *Bellis* v. *United States*, 417 U.S. 85 (1974).[2]

This Court recognized long ago the magnitude of one's right to personal security.

> No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.[3]

Michael Chesternut carried his right to personal security as he travelled the streets of Detroit. *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968); *Katz* v. *United States*, 389 U.S. 347, 351

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[2] The Fifth Amendment privilege prohibits the compulsory production of one's personal papers, because the individual is entitled to "a private enclave where he may lead a private life." *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55 (1964), quoting from *United States* v. *Grunewald*, 233 F.2d 566, 581-582 (2d. Cir. 1956) (Frank, J., dissenting).

[3] *Union Pacific Railway Company* v. *Botsford*, 141 U.S. 250, 251 (1891), cited in *Roe* v. *Wade*, 410 U.S. 113, 152 (1973).

(1967). "This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs." *Terry*, 392 U.S. at 8-9. Additionally, the Fourth Amendment confers the right to freedom of movement and the right to proceed with one's chosen itinerary. See *Terry* v. *Ohio*, 392 U.S. at 34 (Harlan, J., concurring); *United States* v. *Place*, 462 U.S. 696, 708 (1983) (O'Connor, J.).

These fundamental guarantees of privacy and personal security are the reference points which a citizen brings with him to any police-citizen encounter. Police officers are entitled to approach an individual on the street by asking him if he is willing to answer some questions, and the officer may in fact ask questions if the person is willing to answer. *Royer*, 460 U.S. at 497; *Terry*, 392 U.S. at 34 (White, J., concurring); *Id.* at 31 (Harlan, J., concurring). However, the person addressed "has an equal right to ignore his interrogator and walk away." *Id.* at 33 (Harlan, J., concurring). He may refuse to cooperate. *Id.* at 34 (White, J., concurring). "[He] need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way." *Royer*, 460 U.S. at 498. He may not be detained even momentarily without reasonable objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds. *Mendenhall*, 446 U.S. at 556 (opinion of Stewart, J.). Respondent contends that his rights to privacy and personal security were breached when police officers responded to his decision to go on his way by chasing him.

B. The Objective Characteristics of a Police Chase Meet the *Mendenhall-Royer* Standard for Determining a Seizure by Show of Authority.

The extent to which a police chase intrudes on an individual's rights under the Fourth Amendment is best illustrated at the outset by comparing the act of chasing to the act of following. The act of following is investigation by observation. It allows one to continue to observe a moving subject and its goal is to learn more about the person being followed. In *Terry*, for example, before "[d]eciding that the situation was ripe for direct action," Officer McFadden followed Terry and Chilton unobtrusively so that he could continue to observe their suspicious behavior. 392 U.S. at 6.

By contrast the act of chasing is aggressive and obvious. The communicated goal of chasing is to capture. Chasing happens at a speed designed to overtake. The person chased knows he is being chased. The chase itself tells him that detention is intended and it is imminent. Chasing interferes with a person's liberty because it communicates a message and demands a response. A chaser tells his prey, stop or be stopped.

When the person chasing an individual is a police officer, a more powerful message is conveyed, one that goes well beyond a polite request for information. A police chase is an accusation. A chase by an officer announces, "I know you have committed a crime. I am empowered to arrest you. Stop in the name of the law."

The objective characteristics of a police chase meet the standards that this Court has developed to define a seizure by show of authority. The circumstances of a chase are so intimidating that a reasonable person would believe that he is not free to leave. *Immigration and Naturalization Service* v. *Delgado*, 466 U.S. 210, 216 (1984).

It is now well settled that an individual's Fourth Amendment right to personal security and privacy may be violated by encounters with police that fall short of full arrest. *Terry*, 392 U.S. at 16; *Brown* v. *Texas*, 443 U.S. 47, 51 (1979); *Davis* v. *Mississippi*, 394 U.S. 721, 726-727 (1969). A Fourth Amendment "seizure" occurs "whenever a police officer accosts an individual and restrains his freedom to walk away." *Terry*, 392 U.S. at 16. A seizure may be evidenced either by physical force *or* by an exercise of official authority such that "a reasonable person would have believed he was not free to leave." *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).

A majority of the Court has now adopted Justice Stewart's formula as the appropriate standard for distinguishing a "first tier" consensual encounter from a "second tier" investigative detention. *Royer*, 460 U.S. at 502 (plurality opinion); *Id.* at 511-512 (Brennan, J., concurring in result); *Id.* at 514 (Blackmun, J., dissenting). This formula looks not to the subjective impressions of the person confronted, but rather to the objective characteristics of the encounter which may suggest whether or not a reasonable person would believe that he remained free to ignore the officer and walk away. *Delgado*, 466 U.S. at 228 (Brennan, J.).[4] Conversely, the subjective intention of the officer is likewise irrelevant, "except insofar as that may have been conveyed to the" person confronted. *Mendenhall*, 446 U.S. at 509, n.6 (Stewart, J.).

In *Mendenhall*, Justice Stewart offered a list of circumstances evidencing a seizure by "show of authority," among them, "the threatening presence of several officers," and "the use of language or a tone of voice indicating that compliance with the officer's request might be compelled." *Id.* at 554. Clearly, this list was never

intended to be exhaustive. As a majority of the Court agreed in *Royer*,

> [w]e do not suggest that there is a litmus-paper test for distinguishing a consensual encounter from a seizure . . . Even in the discrete category of airport encounters, there will be endless variations in the facts and circumstances, so much variation that it is unlikely that the courts can reduce to a sentence or a paragraph a rule that will provide unarguable answers to the question whether there has been an unreasonable search or seizure in violation of the Fourth Amendment.

460 U.S. at 506-507. The characteristic components of a chase do not appear in the *Mendenhall* show of authority list because the Court had not yet had occasion to consider the specifics of a seizure by chase.

In its rulings since *Mendenhall*, this Court has held that a seizure by a show of authority may occur in any situation where "the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded . . ." *Delgado*, 466 U.S. at 216. As this language suggests, a seizure by show of authority need not involve an actual physical detention. "Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it." *Olmstead*, 277 U.S. at 476 (Brandeis, J., dissenting). Thus in *Dunaway* v. *New York*, 442 U.S. 200, 212-216 (1979), this Court ruled that regardless of whether a suspect has been arrested in the technical sense, probable cause remains a requirement whenever police use means that approach arrest in the course of their investigations. Likewise the Court has rejected the notion that a physical trespass is necessary to a finding of an unreasonable search by electronic surveillance. *Katz* v.

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[4] 3 W.R. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment*, sec. 9.2(h), pp. 407-408 (2d ed. 1987) [hereinafter LaFave].

United States, 389 U.S. 347 (1967). Moreover, an air traveler who is technically free to leave may still be "effectively restrained" by the seizure of his luggage. *Place*, 462 U.S. at 708 (O'Connor, J.). Fifth Amendment interrogation need not involve express questioning. *Brewer* v. *Williams*, 430 U.S. 387 (1977).[5]

The Court has suggested other considerations, in addition to those mentioned by Justice Stewart in *Mendenhall*, which bear on the reasonableness of an individual's belief that he is not free to leave. Uncertainty in the police mission, for example, is a factor distinguishing intimidating confrontations from those that are less threatening. For this reason, INS factory surveys in *Delgado* were deemed reasonable in part because "it was obvious from the beginning of the surveys that the INS agents were only questioning people." 466 U.S. at 220. Likewise, an apparently dispositive fact distinguishing *Royer* from *Mendenhall* was that Mr. Royer was never advised of the parameters of the encounter, while Ms. Mendenhall was twice reassured of her right to decline search and was further informed that she would be allowed to board her plane if nothing were turned up by the search. *Royer*, 460 U.S. at 502-503;[6] *Mendenhall*, 446 U.S. at 556-559. The Court in *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 558 (1976), found that checkpoint stops were less frightening than random, roving-patrol stops in part because as the person approaches a fixed checkpoint stop he is able to view the procedure as other motorists are stopped briefly. *See also United States* v. *Ortiz*, 422 U.S. 891, 894-895 (1975); *Mendenhall*, 446 U.S. at 562, n.3.

Also relevant is whether the person confronted is alone or is otherwise isolated from assistance. Thus random stops have been held by this Court to be inherently more intrusive than checkpoint stops because their approach at odd hours may frighten lone motorists. *Ortiz*, 422 U.S. at 894-895; *see also Delaware* v. *Prouse*, 440 U.S. 648, 657 (1979); *Mendenhall*, 446 U.S. at 562, n.3. In contrast, Justice Powell concluded that Ms. Mendenhall could not reasonably have felt intimidated during her initial encounter with DEA agents because it occurred as she walked through a public area where, if necessary, she could have sought the aid of airline employees stationed nearby. *Mendenhall*, 446 U.S. at 563.

Another pivotal factor evidencing a seizure by show of authority is whether the law enforcement official accuses the subject of a suspected crime during the encounter. LaFave, *supra* at n.4, p. 414. *See also United States* v. *Setzer*, 654 F.2d 354, 356 (5th Cir. 1981), *cert. denied*, 459 U.S. 104 (1982); *United States* v. *Robinson*, 625 F.2d 1211, 1216-1217 (5th Cir. 1980). The opening moments of the *Royer* and *Mendenhall* encounters were virtually identical with one critical exception. Immediately after the agents discovered a name discrepancy, "the detectives informed Royer that they were in fact narcotics investigators and that they had reason to suspect him of transporting narcotics," a fact relied on by a plurality of the Court in finding a seizure. *Royer*, 460 U.S. at 494, 501. No such accusation tainted the initial DEA encounter with Ms. Mendenhall. *Mendenhall*, 446 U.S. at 548.

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[5] Restraint is something less than detention, inhibiting rather than stopping. Detention, conversely, is restraint accomplished. Respondent contends therefore that the notion of "restrain[ing]" under *Terry* and its progeny includes a seizure by virtue of an attempt to detain.

[6] DEA agents retained Royer's airline ticket and driver's license and never informed him when or even if he would be allowed to depart. *Florida* v. *Royer*, 460 U.S. at 502-503.

A recurrent theme in the analysis has been whether the officer has generally conducted himself in an inoffensive manner during the encounter. It was noteworthy in *Mendenhall* that agents were discreet in approaching Ms. Mendenhall and that they "requested, but did not demand to see [her] identification and ticket." 446 U.S. at 555. Justice Rehnquist, dissenting in *Royer*, emphasized that even "Royer [admitted] that the detectives were quite polite." 460 U.S. at 531, n.9. Professor LaFave suggests as to this factor that the overall intrusiveness of the encounter should be measured in terms of whether the contact would be perceived as offensive if it occurred between two ordinary citizens. LaFave, *supra* at n.4, sec. 9.2(h), p. 412.

Applying this Court's own show of authority analysis to the facts of record, the "first tier" permissible encounter in this case occurred in the instant Mr. Chesternut looked in the direction of the approaching vehicle. The fact that this first contact was momentary and wordless does not alter the analysis. *See* LaFave, *supra* at n.4, p. 408, n.225. However, when Mr. Chesternut chose to turn and run, he was exercising his right "to refuse to cooperate and go on his way." *Terry*, 392 U.S. at 34 (White, J., concurring). The officers reacted to this explicit refusal[7] by taking "additional steps." *Delgado*, 446 U.S. at 216.

While petitioner characterizes this chase as a "pursuit", it was unquestionably a chase. First, the officer told the court below that he "*chased*" Mr. Chesternut (J.A. 21). In using the word chase, the officer was not discussing his subjective intentions or his unarticulated plan. *See* Brief for States of Alabama, et al., as *Amici Curiae*, pp. 14-15. Rather, he was describing precisely what he did. Chase is a policeman's word, simple and graphic.

Secondly, the officer's portrait of a chase is corroborated by the objective facts of record. That the cruiser was travelling at an accelerating rate of speed designed to overtake can be inferred from the following facts. The officers' vehicle travelled a distance of one block westbound on Shoemaker, maneuvered a right turn, and then travelled half the length of the apartment building on St. Clair in the same amount of time that it took Mr. Chesternut to run from the street corner to the middle of the apartment building on St. Clair (J.A. 15). Put simply, the officers covered more than twice the ground as Mr. Chesternut in the same amount of time, and he was running. Also characteristic of a chase, the officers focused on Mr. Chesternut from the start, pursuing him alone around the corner and down St. Clair (J.A. 22). They targeted him, converged on him, and overtook him on St. Clair by running parallel with him, placing him between their vehicle and the apartment structure (J.A. 15, 21-22).

In addition to the objective fact of the chase, this situation involved other indicia of a show of authority. When the cruiser overtook Mr. Chesternut on St. Clair, both the markings on the side door of the police cruiser and the "threatening presence" of four officers clearly would have been immediately visible (J.A. 14, 21). *Mendenhall*, 446

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[7] Professor LaFave emphasizes that "most suspects do not attempt to leave or otherwise manifest their lack of consent" to field encounters. LaFave, *supra* at n.4, p. 408; *See also* American Law Institute, Model Code of Pre-Arraignment Procedure, Commentary at pp. 257-258 (1975) [hereinafter Model Code]. Thus, he posits, in the rare instance where a suspect does react by leaving the officer's presence, this "will likely prompt a holding that there was no consent and that police efforts to renew the encounter constitute a seizure." LaFave, p. 408, n.225, citing with approval *State* v. *Saia*, 302 So. 2d 869 (La. 1974), *cert. denied*, 420 U.S. 1008 (1975).

U.S. at 554. That Mr. Chesternut was a pedestrian chased by a motor vehicle is another feature making the confrontation more intimidating.[8] Further, once on St. Clair, Mr. Chesternut was alone and isolated from assistance. The cruiser overtook Mr. Chesternut leaving him between it and a building. In their final act of "running parallel" with Mr. Chesternut, these officers accosted and restrained him in an obvious show of authority. *Terry*, 392 U.S. at 16. Several *amici* in support of petitioner suggest that there was not a show of authority here because the officers did not activate overhead flashers or sirens. There is no record evidence, however, that this vehicle even had flashers or a siren. Moreover, this argument mistakenly presumes that this is the only method by which an officer can convey his intentions.

The totality of the instant chase communicated several clear messages to Mr. Chesternut. At a minimum the chase informed him that his decision to leave the officers' approaching presence was not acceptable to them. Moreover, the chase conveyed an implicit accusation that Mr. Chesternut had done something wrong to warrant such frenzied attention. Finally, the chase conveyed that dentention was intended and imminent. Thus in the same sense that an officer's "tone of voice" can communicate a restraint, these officers communicated by their conduct that "compliance with their request might be compelled." *Mendenhall*, 446 U.S. at 509.

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[8] Petitioner's first Question Presented implies that this pursuit was a foot chase with the officer "run[ning] after" Mr. Chesternut. This is plainly incorrect because this incident was at all times a vehicular chase of a pedestrian. Contrast *People* v. *Shabaz*, 424 Mich. 42, 47; 378 N.W.2d 451, 453 (1985), *cert. dismissed*, ____U.S.____, 106 S.Ct. 3326, 92 L.Ed 2d 733 (1986).

This entire episode contrasts sharply with the "first tier" encounters described in *Mendenhall* and *Delgado*. The kind of aggressive, intrusive police conduct involved here is patently distinguishable from the interactions which occurred in those cases.[9] Mr. Chesternut plainly had no intention of joining these officers "voluntarily in a spirit of apparent cooperation." *Sibron* v. *New York*, 392 U.S. 40, 63 (1968); *Mendenhall*, 446 U.S. at 555. Nor could it be any more obvious that this chase went well beyond the "mere questioning" of the *Delgado* factory surveys. 466 U.S. at 218, 220. Clearly we have vaulted to "tier" two. *Royer*, 460 U.S. at 497-498.[10]

C. This Court Should Continue to Scrutinize Street Confrontations Between the Police and a Citizen Which Fall Short of Literal Detentions.

In *Terry*, this Court was faced with a dilemma: whether to apply the strict requirement of probable cause to every police-citizen encounter or, instead, to remove all but the formal arrest from the purview of the Fourth Amendment. This Court recognized then that the former option would paralyze police in their legitimate attempts at crime prevention, while the latter option left the citizen to the unbridled discretion of police in "the myriad daily situations in which policemen and citizens confront each other on the street." 392 U.S. at 12. The solution reached in *Terry* recognized that the realities of the street compelled the Court to extend its judicial supervision over police activities through the lesser standard of reasonable suspicion. Thus the Court allowed itself to monitor the diverse and volatile street encounter without unduly restricting law enforcement.

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[9] Moreover, using Professor LaFave's yardstick of intrusiveness, surely this encounter would be perceived as offensive if it occurred between Mr. Chesternut and four civilians chasing in a motor vehicle.

[10] In *Delgado*, the Court suggested in dicta that whether or not the individual ultimately leaves police presence is probative of his reasonable fear of detention. 466 U.S. at 219, n.7. Respondent submits that this factor is of questionable relevance and that the individual's acquiescence should not be a prerequisite to Fourth Amendment protection. *See* discussion *infra*. Thus without conceding that this factor has probative value, Mr. Chesternut notes his ultimate reaction to this chase. According to the officer who testified below, he discarded the packets without any apparent attempt to conceal his actions and then he stopped—an act of manifest surrender to police authority (J.A. 15). It can be inferred from these facts that he tossed the packets and stopped after he realized that the officers were not going to allow him to go on his way.

Again in this case, the Court is asked to give up its only means of controlling the police-citizen street encounter, the Fourth Amendment's reasonable suspicion requirement. Witness petitioner's claim that a "seizure is a detention. If there has been no detention, there has been no seizure." Petitioner's Brief, p. 34. Ergo, if there has been no literal detention, then the individual is entitled to no constitutional protection whatsoever. Consequently, petitioner would contend that unless the situation involves a literal detention, the Court is not entitled to scrutinize the police-citizen confrontation. Recall the argument presented and rejected twenty years ago, that because a stop is not an arrest, and because a frisk is not a search, then the Fourth Amendment does not apply and consequently the Court lacks the power of review in this area. *Terry*, 392 U.S. at 10-11. Michael Chesternut urges this Court in reply to reiterate its message in *Terry*, that the realities of on-the-street encounters require some judicial control over police through the touchstone of reasonable suspicion.

D. An Individual's Consent to Detention Should Not be a Prerequisite to a Claim Under the Fourth Amendment of a Seizure by Show of Authority.

Petitioner proposes that absent actual physical restraint, an individual must acquiesce to the exercise of official authority in order to claim a Fourth Amendment seizure. This acquiescence test takes the focus completely away from the officer's conduct, no matter how egregious, and places it on the individual's reaction, as if the individual's conduct should be subjected to constitutional scrutiny rather than the officer's. Conveniently, it allows petitioner to ignore the offensiveness of a groundless police chase. Consequently, this rule would turn the *Mendenhall-Royer* standard completely upside down. As indicated previously, this standard focuses on the objective characteristics of the encounter as they would be viewed by a reasonable person. The officer's outward behavior, his explicit and implicit communications, and his apparent intent to restrain the individual where that has been conveyed, are the central features of this inquiry. To focus instead on the subjective beliefs of the individual, as demonstrated by his flight or surrender, indicates either a gross misunderstanding of the standard or an outright rejection of it.

Presuming for the moment that this Court will refuse to forsake its own show of authority doctrine in this context, there is a further analytical flaw in petitioner's approach. Consent or acquiescence by the person being chased is not a reliable indicator of whether "a reasonable person" would have believed he was free to leave under the circumstances. Consider Professor LaFave's poignant commentary.

> Also, it does not appear . . . that the *Mendenhall-Royer* test is intended to divide police-citizen encoun-

> ters into their seizure and nonseizure categories by reliance upon the amorphous concept of consent. Once more, this is as it should be. On occasion, a suspect will indicate his lack of consent by ignoring the officer's summoning or by leaving his presence, which will likely prompt a holding that there was no consent and that police efforts to renew the encounter constitute a seizure. But these situations are rare; most suspects do not attempt to leave or otherwise manifest their lack of consent. It is nothing more than a fiction to say that all of these suspects have consented to the confrontation.

LaFave, *supra* at n.4, p. 408 (footnotes omitted); *see also* Model Code, *supra* at n.7, p. 259. Conversely, the fact that one individual reacts impulsively by running from a show of authority should not rule out a finding that a reasonable person would have felt restrained.

Flight is an illogical, panicked reaction.[11] It would probably not be the response of one who could leisurely assess the totality of circumstances and make a rational choice. It is, as Professor LaFave notes, the unconventional reaction. For that reason especially, it is not an accurate reflection of what the reasonable person would believe.

Additionally, it is shortsighted at a minimum to suggest that simply because a subject runs from the initial

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[11] Several studies of police vehicular chases have demonstrated the impulsive, irrational nature of the individual's decision to flee. For example, a high percentage of fleeing suspects risked dangerous, high speed chases rather than stopping to accept tickets for minor traffic offenses. *See* Department of California Highway Patrol, *Pursuit Study*, Sacramento, California (June, 1983), and related studies discussed in Erik Beckman, "Identifying Issues in Police Pursuits: The First Research Findings." *The Police Chief*, p. 59 (July, 1987) [hereinafter "Police Pursuits"].

encounter, that the situation can never escalate thereafter into an oppressive show of authority. Witness Mr. Chesternut, who at first felt free enough to run, but when confronted with an obvious police chase, felt restrained enough to stop. Respondent contends that the seizure occurred in this case as the chase developed, after he fled from the corner, but before he dropped the packets and stopped. His impulsive flight at the outset should not bar that claim.

Petitioner's acquiescence test is infirm further because it requires an intolerable election between two distinct rights unquestionably afforded under the Fourth Amendment. *See Simmons* v. *United States*, 390 U.S. 377, 394 (1968).[12] While the person has a right to go on his way, he must give up that right in order to claim a second tier seizure. Alternatively, if he exercises his right to go on his way, he then loses the right to be free from a second tier seizure which may follow automatically. The Michigan Supreme Court emphasized the forced election of rights intrinsic to petitioner's acquiescence test.

> . . . [A]ny citizen who refuses to answer a plainclothes police officer's investigative questions during a "tier one" inquiry, and instead exercises his constitutional right to "go on his way" - at top speed - would, by the act of exercising his right to "move on," invite a full-blown tier two *Terry* "stop and frisk" not because of the addition of any articulable or particularized suspicion of imminent criminal activity,

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[12] The *Simmons* prohibition against compelled elections was later modified in *McGautha* v. *California*, 402 U.S. 183, 212-213 (1971), where this Court instructed the lower courts to assess in each instance "whether compelling the election impairs to an appreciable extent any of the policies behind the rights" involved.

> but because he exercised his right to the freedom of movement the Fourth Amendment guarantees.

People v. *Shabaz*, 424 Mich. at 63; 378 N.W.2d at 460.

Finally, at the heart of petitioner's test is a presumption that an individual waives his *Mendenhall-Royer* right to avoid police presence if he goes on his way by running rather than walking. This presumption, in turn, posits that this distinction is justified because running is inherently more suspicious than walking, so much so that flight in and of itself provides a reasonable, objective belief that the person is engaged in criminal activity. This latter notion has been explicitly rejected by every lower court that has addressed the issue squarely. *See* discussion *infra*. Moreover, it has been implicitly rejected by this Court on several occasions. *United States* v. *Sharpe*, 470 U.S. 675, 682-683, n.3 (1985); *Wong Sun* v. *United States*, 371 U.S. 471, 483-484, n.10 (1963). Thus, if this Court deals first with this central proposition, that flight alone constitutes traditional reasonable suspicion, and finds it untenable, then petitioner's acquiescence test must likewise be repudiated.[13]

Respondent contends that the instant case can be decided narrowly, on its facts, by applying the show of authority standard set forth by a majority of this Court in *Mendenhall* and *Royer*. The characteristic components of a chase are, however, different to some extent than those involved in the investigative detention situation which begat that standard. Consequently, it is worthwhile to

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[13] The remaining nuance to petitioner's proposed test, the reasonable person "innocent of any crime" phrase, adds nothing of substance to the *Mendenhall-Royer* objective test. *See* LaFave *supra* at n.4, p. 411, n.240. Therefore respondent urges that the added language be rejected as surplusage.

explore how the lower courts have treated the specifics of a seizure by police chase.

The cases cited below each involved the question of whether a police chase constitutes a Fourth Amendment seizure and each involved the identical fact sequence: approach by police, flight by defendant, chase by police, discarding of evidence and then arrest. *In re D. J.*, 42 Cr.L. Rptr. 2099 (D.C. App. Oct. 19, 1987); *People* v. *Washington*, 236 Cal. Rptr. 840 (Cal. App. 1987); *People* v. *Shabaz*, 424 Mich. at 47, 378 N.W.2d at 453; *People* v. *Thomas*, 660 P.2d 1272 (Colo. 1983); *People* v. *Howard*, 50 N.Y.2d 583, 430 N.Y.S.2d 578, 408 N.E.2d 908, *cert. denied*, 449 U.S. 1023 (1980); *Commonwealth* v. *Barnett*, 398 A.2d 1019 (Pa. 1979); *Commonwealth* v. *Jeffries*, 311 A.2d 914 (Pa. 1973); *State* v. *Saia*, 302 So.2d 869 (La. 1974), *cert. denied*, 420 U.S. 1008 (1975).[14]

In those cases post-dating the *Mendenhall* formula, the Courts emphasized that when a police officer chases a person who has chosen to go on his way "the officer is exercising a restraint on the person such that a reasonable person would not feel he is able to leave." *Washington*, 236 Cal. Rptr. at 843; *Howard, supra; In re D.J., supra; see also United States* v. *Bennett*, 514 A.2d 414, 418 (Mack, J., dissenting).

Several opinions have viewed the police chase as an "imminent" or constructive detention.

> Giving chase after an individual in a manner designed to overtake and detain or encourage the individual to

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[14] A number of these cases involved a concession by the prosecution that a second tier seizure had occurred by virtue of the chase. *Shabaz*, 424 Mich. at 59, n.7; 378 N.W.2d at 458, n.7; *see also Thomas*, 660 P.2d at 1274; *Jeffries*, 311 A.2d at 916.

> give up his flight is a detention. It is an overt manifestation of an officer's authority that restrains the liberty of a citizen.

Washington, 236 Cal. Rptr. at 843 (citations omitted). Likewise in *Saia*, where officers pursued a woman who had obviously chosen to avoid their presence, the court held,

> . . . [t]he police cannot approach citizens under circumstances that make it seem that some form of detention is imminent unless they have probable cause to arrest the individual or reasonable grounds to detain the individual under *Terry* v. *Ohio*, *supra*.

302 So.2d at 873, cited with approval by LaFave, *supra* at n.4, p. 408, n.225. The Massachusetts Supreme Judicial Court found a vehicular police chase of a bicyclist to be the functional equivalent of actual detention, reasoning,

> [p]ursuit that appears designed to effect a stop is no less intrusive than a stop itself. In other words, the officer's right to pursue when a stop appears imminent can be no broader than his right to stop.

Commonwealth v. *Thibeau*, 429 N.E.2d 1009, 1010 (Mass. 1981).

Additionally, several courts have stressed that where a person has once rebuked police efforts by running, renewed police efforts via the chase cannot be viewed as simply a further approach for the purpose of questioning. Rather, a chase under these circumstances must be considered an attempt to detain, and ergo, a seizure. *Commonwealth* v. *Barnett*, 398 A.2d at 1021; *Shabaz*, 424 Mich. at 58-59, 378 N.W.2d at 460; *Accord* LaFave, p. 408, n.225.

Sanctioning a police chase on these facts leads to the anomaly of allowing officers to do indirectly that which

they cannot do directly. They cannot stop respondent so instead they chase him thereby coercing him to stop on his own. In other contexts, authorities have recognized this problem and have forbidden the indirect activity. For example, police cannot avoid the *Payton* arrest warrant requirement by coercing the arrestee to come outside the house where he can be lawfully arrested. *Payton* v. *New York*, 445 U.S. 572 (1980); *United States* v. *Roper*, 681 F.2d 1354 (11th Cir. 1982), *cert. denied*, 459 U.S. 1207 (1983); *United States* v. *Al-Azzawy*, 784 F.2d 890 (9th Cir. 1985). In *Roper*, DEA agents were not allowed to make a warrantless arrest outside Roper's motel room, because Roper had exited his room only after the agent informed him that he was "surrounded by armed agents and should come out of his room 'for his own safety.'" 681 F.2d at 1357, n.1.

Alternatively, police may not overstate their actual authority to accomplish their objective. Thus in *Bumper* v. *North Carolina*, 391 U.S. 543 (1968), the fruits of a search were suppressed where consent to search was gained by the officer's false claim that he had a search warrant.

> When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. The situation is instinct with coercion—albeit colorably lawful coercion. Where there is coercion there cannot be consent.

391 U.S. at 550.

Similarly, in situations where police are forbidden under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), from interrogating a suspect, they are likewise forbidden from engaging in the "functional equivalent" of interrogation including "any words or actions on the part of the police

. . . that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis*, 446 U.S. 291, 301 (1977); *Brewer* v. *Williams*, 430 U.S. 387 (1977) (the "Christian burial speech").

> To limit the ambit of *Miranda* to express questioning would "place a premium on the ingenuity of the police to devise methods of indirect interrogation, rather than to implement the plain mandate of *Miranda*."

Innis, 446 U.S. at 299, n.3, quoting from *Commonwealth* v. *Hamilton*, 285 A.2d 172, 174 (Pa. 1971).

These analogies highlight the incongruity of prohibiting detention while permitting chase under the Fourth Amendment. The "plain mandate" of *Mendenhall* is that once a person has rebuked the initial police encounter, "he may not be detained even momentarily without reasonable objective grounds for doing so . . ." *Royer*, 460 U.S. at 498. To achieve the same objective through the compulsion of a chase surely is no less offensive to the Fourth Amendment.

Petitioner argues in essence that a chase is merely an attempted seizure outside the purview of the Fourth Amendment, and consequently that until a seizure occurs by virtue of a literal detention the citizen is entitled to no constitutional protection. Mr. Chesternut responds that when four identifiable police agents in a marked police cruiser chase and overtake him on a public street after he has expressed his desire not to cooperate by running away, the functional equivalent of a seizure has occurred. This is so because the chase implicates every interest that the Fourth Amendment was intended to protect.

As a matter of policy, police officers should not be encouraged to escalate on-the-street situations in the hope of creating a justification for their actions. Thus the court cautioned in *Commonwealth* v. *Thibeau*, 429 N.E.2d at 1010, that unless the groundless police chase is forbidden, "the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion." *See also State* v. *Saia*, 302 So.2d at 873 ("Police cannot actively create 'street encounters' . . ."). This principle has been recognized in other contexts. *See* Baldassano, Valli F., "Police Created Exigencies: Implications for the Fourth Amendment," 37 Syracuse L. Rev. 147 (1986). Exigent circumstances such as the feared escape of a suspect or the probable destruction of contraband generally provide exceptions to the rule requiring warrants for non-consensual entries. Such entries are permitted, however, only where the claimed exigency is unforeseeable and uncontrived. *Santana* v. *United States*, 427 U.S. 38, 49 (1976) (Marshall, J., dissenting); *Segura* v. *United States*, 663 F.2d 411 (2d Cir. 1981), *aff'd*, 468 U.S. 796 (1984);[15] *United States* v. *Roselli*, 506 F.2d 627 (7th Cir. 1974); *United States* v. *Velasquez*, 626 F.2d 314 (3d Cir. 1980); *People* v. *Wilson*, 408 N.E.2d 988 (Ill. 1980); *Spiering* v. *State*, 472 A.2d 83 (Md. 1984). In this context, police officers may not act "with the intent improperly to circumvent the warrant requirement by purposefully precipitating a situation, 'through illegal conduct', in which the destruction of evidence or contraband is likely." *Unites States* v. *Kunkler*, 679 F.2d 187, 191, n.3 (9th Cir. 1982). For example, in *International Molders and Allied Workers* v. *Nelson*, 643 F. Supp. 884, 896-897 (N.D. Cal.), *remanded on other gds.*, 799 F.2d 547 (9th Cir. 1986), where the court reviewed warrantless workplace raids by the INS, since the agents could expect

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[15] This Court did not reach the claim of police created exigency, affirming instead on other grounds.

that their sudden arrival "en masse" would provoke turmoil, fear and flight, this awareness precluded a finding of good faith. The resulting exigency, flight of suspected aliens, was viewed as foreseeable, intended and agent-created. *Id.* at 898.

The notion of a police created exigency gives new meaning to the officers' chase of Mr. Chesternut. If they had no intention of detaining Mr. Chesternut,[16] then we must assign some other rational explanation to their activity. The only believable alternative is that this chase was intended as a roust, an "expedition for evidence in the hope that something might turn up." *Brown* v. *Illinois*, 422 U.S. 590, 605 (1975). Mr. Chesternut ran. The officers chose an escalated response. They opted for chasing because chasing is demonstrative and it generates a predictable reaction: fear, confusion and panic. Officers can expect that a police-cruiser chase of a pedestrian will startle and unnerve. This kind of a chase is a non-contact shakedown designed to precipitate some frantic response that the officers can then label as suspicious or furtive, and then they can stop their suspect "legitimately."

E. The Constitutional Intrusion Occasioned by a Chase Outweighs Its Questionable Law Enforcement Value.

Whether or not a particular intrusion is reasonable under the Fourth Amendment depends upon a three factor assessment of the special law enforcement interest presented: "(i) the public interest served by the seizure, (ii) the nature and scope of the intrusion, and (iii) the objective facts upon which the law enforcement officer

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[16] The officer claimed that he and his partners chased Mr. Chesternut solely to "see where he was going" (J.A. 25).

relied in light of his knowledge and expertise."[17] *Mendenhall*, 446 U.S. at 561 (Powell, J., concurring) (citations omitted). Respondent contends that in this case the balance can be reduced to the following inquiry: "what articulable law enforcement concern allowed these officers to chase respondent as opposed to following him in a less intrusive way?"

This question first calls for an examination of the characteristics and proportions of the specific crime problem being addressed. In recent cases, this Court has held that the balance must acknowledge those special situations involving crime problems of immense and growing proportions. In *Mendenhall*, the concern was large-scale drug trafficking through international airports by sophisticated and organized criminal syndicates. 446 U.S. at 561-562 (Powell, J., concurring). In *Delgado*, the Court addressed problems created by "the presence of large numbers of undocumented aliens" in the workplace. 466 U.S. at 239 (Powell, J., concurring). Likewise, the Court has allowed a greater government intrusion where the unlawful activity is peculiarly difficult to detect. *United States* v. *Montoya De Hernandez*, 472 U.S. 531, 543 (1985) (alimentary canal smuggler); *Camara* v. *Municipal Court*, 387 U.S. 523, 537 (1967) (internal building defects).

Neither situation is presented here. These officers were on routine patrol and as such their efforts were not directed at any particular crime problem (J.A. 19). There is no indication that this was a high-narcotics or high-crime area of any kind. The law enforcement interest involved here is the day to day functioning of the street patrolman in the general prevention of crime. This broad objective was considered "weighty", but insufficient to justify a comparable intrusion in *Brown* v. *Texas*, 443 U.S. at 52. Even if we assume that the resultant seizure could supply the missing specific law enforcement objective, the detection of a possessory narcotics offense is amongst the lesser police exigencies. LaFave, *supra* at n.4, p. 358; Model Code, *supra* at n.7, p. 277; *United States* v. *Sharpe*, 470 U.S. at 689, n.1 (Marshall, J., concurring in judgment). *See also Welsh* v. *Wisconsin*, 466 U.S. 740, 753 (1984).[18] The facts of record portray Mr. Chesternut as a street level consumer as evidenced by the hypodermic needle in his hatband and the small amount of narcotics seized (J.A. 16, 25-26).[19]

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[17] It is uncontested that the objective fact relied on for this intrusion was flight alone. This portion of the analysis is discussed, *infra*, at Question Number 2.

A second reasonableness prerequisite is that the police intrusion be "carefully tailored to its underlying justification." *Royer*, 460 U.S. at 500. In this regard, the Court has commended those investigative methods which are uniquely suited to the crime problem addressed. For example, to combat the problem of drug trafficking through international airports, DEA agents receive specialized training regarding the characteristics of drug traffickers to increase their ability to detect the guilty and to reduce the number of innocent people affected. *See Royer*, 460 U.S. at 525, n.6 (Rehnquist, J., dissenting). In contrast, these officers were from the "uniform division" of their precinct and were not assigned to any specialized narcotics division (J.A. 18). Moreover, chasing anyone who runs is hardly a high-return crime detection technique.

A related requirement is that "the investigative methods employed should be the least intrusive means reasonably available" to accomplish the objective. *Royer*, 460 U.S. at 500. Thus in *United States* v. *Place*, the uniquely limited canine sniff procedure was found to be preferable to the prolonged seizure of luggage. 462 U.S. at 707 (O'Connor, J.). Respondent submits that by following, the officers could have accomplished their objective without violating his Fourth Amendment rights. *Accord People* v. *Washington*, 236 Cal. Rptr. at 843, n.1; *People* v. *Howard*, 430 N.Y.S.2d at 585. Any suggestion that chasing was necessary to maintain contact with Mr. Chesternut is belied by the facts of record. In a vehicle chasing a pedestrian, these officers had a decided speed advantage. Mr. Chesternut was running in a straight line on the sidewalk, alone, down St. Clair. Nothing obstructed their view of him and thus chasing was not necessary to maintain visual surveillance (J.A. 21-22).

Nor is chasing in this context an "essential attribute" of the police investigative power. *See Tennessee* v. *Garner*,

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[18] In *Welsh*, this Court held that "an important factor to be considered when determining whether any exigency exists [for hot pursuit purposes] is the gravity of the underlying offense for which the arrest is made." 466 U.S. at 753. *See also Tennessee* v. *Garner*, 471 U.S. 1, 21 (1984).

[19] Moreover, there is a unique tendency toward police misconduct in the category of possessory drug offenses. Many authorities have recognized the prevalence of pretext searches and "dropsy" testimony in street level drug cases. Model Code, *supra* at n.7, pp. 273-278; *Williams* v. *Adams*, 436 F.2d 30, 38 (2d.Cir. 1970) (Friendly, J., dissenting), *aff'd*, 407 U.S. 143 (1972); Barlow, "Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices 1960-62," 4 Crim. L. Bulletin 549 (1968); "Police Practices in Narcotics Cases," 4 Columbia Journal of Law and Social Problems 87, 94-96 (1968). The latter evil is uniquely apparent in this case. It is highly unlikely that Mr. Chesternut, having observed the cruiser on Shoemaker, would wait until it had traversed a full block and a half before tossing the packets in full view of the officers. *Sibron* v. *New York*, 392 U.S. at 46, n.3.

471 U.S. at 11. It is unlikely that police departments themselves recommend chasing as the preferred approach to persons who have left police presence.[20]

Respondent contends that a holding discouraging a chase on these facts would not hamper effective law enforcement. First, this ruling pertains to a minute percentage of police-citizen interactions. Most people do not flee from police. *See* discussion *supra* at n.7. In the vast majority of street situations, suspects are not allowed to flee with impunity because flight is generally coupled with other circumstances which legitimately give rise to reasonable suspicion or probable cause. The rare individual who would be inclined to flee will not know the officer's level of cause at the moment he decides to run. As a practical matter, this decision only applies to vehicle-pedestrian chases because in most jurisdictions fleeing from police in a motor vehicle is itself a crime. *See, e.g.*, Mich. Comp. Laws Ann. 750.479a (1966).

Secondly, police officers have equally effective methods of dealing with the crime problem addressed. As discussed earlier, following is superior to chasing if the true

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[20] For example, the District of Columbia Metropolitan Police Department General Order 304-10 instructs:

> [p]ersons "contacted" may not be detained against their will or frisked. They may not be required to answer the officer's question or in any way respond to the officer if they choose not to do so. The officer may not use force or coercion to attempt to require citizens to stop or respond. If they refuse to cooperate, they must be permitted to go on their way, however, if it seems appropriate under the circumstances, they may be kept under surveillance.

Quoted in *United States* v. *Wylie*, 569 F.2d 62 (D.C. Cir. 1977) (Robinson, J., dissenting in part).

objective is to see where a subject is going.[21] In the isolated situation where simple following causes the officer to lose his subject, this "does not necessarily mean that the suspect will never be caught." *Tennessee* v. *Garner*, 471 U.S. at 9, n.8. Moreover, in a variety of other contexts, we have accepted the idea that a suspect may be allowed to avoid the police, for example if he walks away from his police interrogator, *Royer, supra*, or if he flees to the sanctity of his home. *Payton* v. *New York*, 445 U.S. 573 (1980); *see also Tennessee* v. *Garner, supra*. "[T]here is nothing new in the realization that the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all." *Arizona* v. *Hicks*, ____U.S. ____, 94 L.Ed.2d 347, 357 (March 3, 1987) (Scalia, J.). Such is the cost of maintaining a free society. At worst a rule discouraging a chase in this limited situation requires that *if* the individual has committed a crime, police must secure evidence from sources other than the suspect himself.[22]

Contrast the price society pays for the groundless police chase. Random chases will inevitably affect a percentage of innocent people. To impose that intrusion on these people "is an evil in itself, and may lead as well to the further evil of resentment against the police and civil authority in general." Model Code, *supra* at n.7, p. 273. Secondly, the chase equals the random stop in its potential for harassment and abuse. *See Terry*, 392 U.S. at 14-15, n.11. Thirdly, a chase poses a unique danger because it instantly escalates the police-citizen encounter. Finally, the police chase poses a serious risk of physical injury and death not only to the immediate participants, but to innocent bystanders as well.[23] While the police chase may be necessary in other situations, its value in this context does not offset its cost to society.

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[21] More specifically in the investigation of narcotic activity, law enforcement has far more effective means of securing evidence than the street encounter. Model Code, *supra* at n.7, p. 276; D. Black and A. Reiss, Jr., *Studies of Crime and Law Enforcement in Major Metropolitan Areas*, Vol. II, sec. I (1967).

[22] "[A] fair state-individual balance [requires] the government to leave the individual alone until good cause is shown for disturbing him and [it requires] the government in its contest with the individual to shoulder the entire load." *Murphy* v. *Waterfront Commission*, 378 U.S. at 55, quoting from 8 Wigmore, *Evidence* 317 (McNaughton rev., 1961).

Finally, Mr. Chesternut urges this Court to consider the full ramifications of a holding that an individual is entitled to no Fourth Amendment protection until he is literally detained. Short of detention, a police officer could do anything he wishes to the citizen with impunity.

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[23] The Center for the Environment and Man, Inc., "A Study of the Problem of Hot Pursuits by the Police," Washington D.C., U.S. Department of Transportation (1970); Physicians for Automotive Safety, "Rapid Pursuit by the Police: Causes, Hazards, Consequences," Springfield, N.J. (1967), cited in Erik Beckman, "Police Pursuits," *supra* at n.11, p.1. At least fourteen innocent bystanders have been killed in the Detroit area since 1982 as the result of police chases. Detroit Free Press, December 3, 1987, p. 14B.

The statistics referenced above all relate to vehicle on vehicle police chases. They are included here because the vehicular chase of a pedestrian shares at least two of the same dangerous attributes: the rapid acceleration of a motor vehicle in a populated area coupled with the "pursuit fixation." The latter phenomenon is defined by criminal justice experts as,

> . . . becoming so engrossed in the apprehension of a fleeing violator that the safety of others is forgotten or ignored. In many pursuit situations it becomes a personal challenge to the police officer rather than a response to a violation of the law. In these situations the challenge to police authority seems more important than the offense. . .

Tom Barker, "Police Pursuit Driving: The Need for Policy," *Police Chief*, p. 70 (July, 1984).

It is hardly a radical notion that without some active control by the judiciary, the street officer may abuse his discretion in police-citizen confrontations. Yet petitioner dismisses this possibility in one sentence of its brief as "beyond serious consideration." For two decades this Court has disagreed. Since *Terry* the Court has recognized that the police officer faces a difficult and explosive situation on the street and that he needs an escalating set of flexible responses, yet the Court has refused to abdicate its judicial control over him because "the protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases, especially when that balancing may be done in the first instance by police officers engaged in the 'often competitive enterprise of ferreting out crime.'" *Dunaway* v. *New York*, 442 U.S. at 213, quoting from *Johnson* v. *United States*, 333 U.S. 10, 14 (1948). In short, if the officer does the balancing, his needs will always be paramount at the cost of individual liberty.

II. FLIGHT ALONE, UNACCOMPANIED BY ANY OBJECTIVE FACTOR SUGGESTING THAT AN INDIVIDUAL IS ENGAGED IN CRIMINAL ACTIVITY, CANNOT GIVE RISE TO A REASONABLE SUSPICION SUFFICIENT TO JUSTIFY A SEIZURE UNDER THE FOURTH AMENDMENT.

A. Flight Alone Is Not a Reliable Indicator of Guilt in the Absence of Other Circumstances Making Its Import Less Ambiguous.

Fourth Amendment seizures which fall short of traditional arrests are justifiable only if the officer involved has "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *United States* v. *Cortez*, 449 U.S. 411, 417-418 (1981). In this phase of the analysis, the government "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion." *Terry*, 392 U.S. at 21. The rationale for these guidelines was expressed in *Brown* v. *Texas*, 443 U.S. at 52: "[w]hen such a stop is not based on objective criteria, the risk of arbitrary and abusive police practices exceeds tolerable limits."

Respondent submits that the objective facts necessary to justify the intrusion were wholly lacking in this case. In deciding to chase Mr. Chesternut, these officers did not claim to be drawing from specialized training or some heightened awareness "of the modes or patterns of operation of certain kinds of lawbreakers." *United States* v. *Cortez*, 449 U.S. at 418. *Cf. Mendenhall*, 446 U.S. at 548, n.1 ("drug courier profile"); *Martinez-Fuerte*, 428 U.S. at 556 (transportation of illegal Mexican aliens). In fact the only record reference to any specialized training among these officers was that the officer testifying was once a paramedic (J.A. 24). The intersection involved here was not known as a high-crime area. The officers had no information concerning Mr. Chesternut or any crime involving a person of his description. The officers did not observe Mr. Chesternut at some late or unusual hour "from which [an] inference of criminality may be drawn." *People* v. *Bower*, 24 Cal. 3d 638, 645; 156 Cal. Rptr. 856; 597 P.2d 115 (1979). Prior to Mr. Chesternut's departure from the corner, the officers did not observe him do anything suspicious or anything even remotely related to criminal activity. The officers' only proffered factual justification for the chase is that Mr. Chesternut ran and they wanted "to see where he was going" (J.A. 25).

Contrast the particularized and articulable suspicion of imminent criminal activity that justified the stop and frisk in *Terry*, 392 U.S. at 6.

> It was clear to the officers in *Terry* that when Terry and his friends conducted an "elaborately casual and oft-repeated reconnaissance of the store window on Huron Road," by walking past it first in one direction then another and peering in the window, and "repeated this ritual alternately between five and six times," each time conferring with a third person stationed a short distance away, the suspects were "casing a job, a stick-up."

People v. *Shabaz*, 424 Mich. at 63; 378 N.W.2d at 460-461, quoting from *Terry*, 392 U.S. at 6.

It is uncontested that the only factor relied on to justify this chase is flight. In this regard, the prevailing view is that flight is not "a reliable indicator of guilt without other circumstances to make its import less ambiguous." *Hinton* v. *United States*, 424 F.2d 876, 879 (D.C. Cir. 1969); 2 W. R. LaFave, *Search and Seizure*, sec. 3.5(e), p. 64; *In re D. J.*, 42 Cr.L. Rptr. 2009 (D.C. App. Oct. 19, 1987); *People* v. *Washington*, 236 Cal. Rptr. 840 (Cal. App. 1987); *People* v. *Howard*, 50 N.Y.2d 583, 430 N.Y.S.2d 578, 408 N.E.2d 908 (1980); *People* v. *Thomas*, 660 P.2d 1272 (Colo. 1983); *Commonwealth* v. *Thibeau*, 429 N.E.2d 1009 (Mass. 1981); *People* v. *Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *State* v. *Saia*, 302 So.2d 869 (La. 1974). Consciousness of guilt is not the only meaning to be assigned to flight, even where it is clear that the officer's true identity is known to the individual.[24]

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[24] In the studies discussed previously, two clear findings evolved

> An individual may be motivated to avoid the police by a natural fear or dislike of authority, a distaste for police officers based upon past experience, an exaggerated fear of police brutality or harassment, a fear of being apprehended as the guilty party, or other legitimate personal reasons.

In Re D. J., 42 Cr.L. Rptr at 2100, n.4 (citations omitted); *Wong Sun*, 371 U.S. at 483, n.10.[25] Moreover, these subjective beliefs may well be founded. This Court has long recognized the problem of chronic police-community tension in black and other minority communities. *Terry*, 392 U.S. at 14, n.11; *see also* United States Commission on Civil Rights, *Who is Guarding the Guardians?*, p.6 (1981). Thus flight is considered ambiguous even if it appears to be in response to the presence of authorities.

Consequently, because evasive actions are ambiguous in nature, they cannot, standing alone, give rise to a reasonable suspicion. *Sharpe*, 470 U.S. at 683, n.3. Moreover, this proposition is not at odds with the conventional wisdom that flight, when coupled with other furtive or suspicious circumstances, gives rise to probable cause. Isolated flight provides only a "heightened general suspicion." *Shabaz*, 424 Mich at 63; 378 N.W.2d at 460. Flight "plus", in contrast, confirms and bolsters the founded suspicion, supplying the reasoned articulable basis to conclude that criminal activity is afoot. *Id.*

> It is only when a person's effort to avoid police contact is coupled with an officer's specific knowledge connecting that person to some other action or circumstance indicative of criminal conduct that the evasive action, whether running or otherwise, takes on sufficiently suspicious character to justify a stop.

People v. *Thomas*, 660 P.2d at 1275-1276 (citations omitted). *See e.g. Peters* v. *New York*, 392 U.S. 40, 66-67 (1968). Petitioner's brief acknowledges as much in its reliance on cases holding that "flight is a factor *taken in the aggregate* for a reasonable suspicion determination." Petitioner's Brief, p. 55 (emphasis supplied).

Moreover, petitioner's argument in this second issue is a transparent attempt to render meaningless any constitutional protection this Court should decide to confer in the first issue. If running away by itself constitutes a reasonable suspicion, then every police chase will be deemed a reasonable seizure because the police chase invariably involves someone running away. Once again petitioner seeks to nullify Fourth Amendment protection and this Court's power to scrutinize by leaving the decision to chase to the uncontrolled discretion of the street officer.

B. Because the Police Chase of Mr. Chesternut Was Not Justified by Reasonable Suspicion, His Alleged Discarding of Evidence During the Chase Must be Viewed as the Coerced Product of an Unreasonable Seizure.

In its first Question Presented, petitioner suggests that where there is no preceding Fourth Amendment seizure,

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which demonstrate that flight is not reliably probative of criminal activity.

(i) Police officers generally believe that when a suspect flees from an identifiable officer after a minor traffic offense, his decision to flee is likely prompted by his involvement in a more serious crime.

(ii) The majority of the individuals in this category (suspects fleeing from a minor traffic offense) were *not* in fact guilty of a more serious crime.

Erik Beckman, "Police Pursuits," *supra* at n.11.

[25] ". . . [I]t is a matter of common knowledge that men who are entirely innocent do sometimes fly from the scene of a crime through fear of being apprehended as the guilty parties, or from an unwillingness to appear as witnesses. Nor is it true as an accepted axiom of criminal law that 'the wicked flee when no man pursueth, but the riteous are as bold as a lion.'" *Alberty* v. *United States*, 162 U.S. 499, 511 (1896).

evidence discarded during flight must be considered voluntarily abandoned. As worded, this abandonment claim is totally dependent on the Court's resolution of the seizure question and as such this issue requires no further discussion by respondent.

To the extent that petitioner now raises a different theory of abandonment, it is not properly before this Court because this issue was not ruled on by the court below and it was not raised separately in the petition. Rule 21.1(a) of the Supreme Court; *Irvine* v. *California*, 347 U.S. 128, 129-130 (1954) (Jackson, J.); *People* v. *Chesternut*, 157 Mich. App. 181 (1986). *See also* Brief for the United States as *Amicus Curiae* Supporting Petitioner, pp. 6-7, n.1.

Notwithstanding and without agreeing that this issue is properly before the Court, respondent offers this brief reply to petitioner's alternate abandonment theory. The question of whether evidence discarded during flight after an illegal seizure by police is a "fruit of the poisonous tree" is governed by this Court's holding in *Wong Sun* v. *United States*, 371 U.S. at 488. The fruits of "officers' illegal action are not to be admitted as evidence unless an intervening act of free will purges the primary taint of the unlawful invasion." *Shabaz*, 424 Mich. at 66; 378 N.W.2d at 462; *Wong Sun*, 371 U.S. at 487-488. The first step in this analysis is to determine whether the discarding of evidence is preceded by illegal police conduct, in this case an unreasonable seizure. Obviously, a coerced abandonment is not a "voluntary" abandonment. If an unlawful seizure has occurred, the next step is to evaluate whether some act of free will has "dissipated" the taint of the illegal activity. *Nardone* v. *United States*, 308 U.S. 338, 341 (1939). Whether an act is the product of free will depends on a number of factors, among them the "temporal proximity [of the act to the illegal conduct] . . . the presence of intervening circumstances . . . [and the] purpose and flagrancy of the official misconduct." *Brown* v. *Illinois*, 422 U.S. 590, 603-604 (1975). Applying these criteria to the instant facts, it is amply apparent that the abandonment of contraband by Mr. Chesternut was not free of the taint of the illegal chase. If Mr. Chesternut discarded the packets during the chase as claimed by the officer, then the abandonment occurred while he was seized and there could be no intervening circumstances. *See People* v. *Washington*, 236 Cal. Rptr. at 844. The officers' decision to chase Mr. Chesternut without any articulable, objective basis to believe that he was engaged in criminal activity was an abuse of the police investigatory power, harassment disguised in *Terry's* mantle. *Gray* v. *United States*, 292 A.2d 153, 156 (D.C. App. 1972) (Nebeker, J., concurring).

Petitioner's "anticipatory abandonment" argument relies almost exclusively on a 1979 opinion from the Florida Court of Appeals. *State* v. *Oliver*, 368 So.2d 1331 (Fla. App. 1979). *Oliver's* holding, however, reveals two fatal defects. First, the opinion ignores the second critical step in proper abandonment analysis, a review of the *Brown* factors to determine if an act is truly the product of free will sufficient to purge the taint of illegal activity. *Brown* v. *Illinois*, 422 U.S. at 603. Secondly, the opinion engages in the contorted logic that only an attempted illegal search can yield an involuntary abandonment. This is plainly incorrect.[26]

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[26] The plethora of cases holding that an attempted seizure also can result in an involuntary abandonment have been discussed previously, *supra* at n.14.

The unfortunate holding in *Oliver* results from a misreading of the facts in *Hester* v. *United States*, 265 U.S. 57 (1924); *Oliver*, 368 So.2d at 1334. The authors of *Oliver* cite *Hester* to support the notion that *even in the face of an illegal seizure*, the resulting abandonment can be deemed voluntary. A careful review of *Hester* reveals, however, that Mr. Hester's discarding of whiskey bottles was not preceded by any illegal government activity and for that reason Mr. Hester's abandonment was deemed a voluntary act.[27] The case of *United States* v. *Pirolli*, cited by petitioner, is inapposite for the same reason. At the moment Mr. Pirolli discarded evidence, "[n]othing [the agents] had done thus far was illegal." 673 F.2d 1200, 1204 (11th Cir. 1982).

As the foregoing discussion demonstrates, on the facts of this case if the officers were not justified in chasing Mr. Chesternut, then his act of discarding the packets must be viewed as the coerced product of unlawful police activity.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the State of Michigan should be affirmed.

Respectfully submitted,

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[27] In *Hester*, the only arguably illegal activity, a trespass, occurred *after* Hester had thrown the bottles.

SUPPLEMENTAL
BRIEF

⑩

NO. 86-1824

[illegible] COURT, U.S.
FILED
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CLERK

THE SUPREME COURT OF THE UNITED STATES

October term 1987

THE PEOPLE OF THE STATE OF MICHIGAN
Petitioner

v

MICHAEL MOSE CHESTERNUT
Respondent

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

SUPPLEMENTAL BRIEF FOR PETITIONER

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A SEIZURE IS A SEIZURE IS A SEIZURE: ONE MAY ONLY LITIGATE THAT WHICH HAPPENS TO HIM.

In reviewing a 42 USC 1983 cause of action wherein a deprivation of a constitutional right is alleged several Circuits have determined whether a seizure has occurred under the Fourth Amendment. In a high speed vehicular pursuit case wherein the plaintiff was hailed and pursued by police with lights and sirens operating,the Sixth Circuit, relying heavily on Terry v Ohio, found that there was no restraint of liberty by show of authority of an individual who fled rather than obey the command. Galas v McKee 801 F 2d 200 (CA 6, 1986). The Court held that "the Fourth Amendment protects against 'unreasonable seizures' not unreasonable conduct nor outrageous conduct in general." 801 F 2d at 202.

> In summary, we hold that the reasonableness of a seizure or method of seizure cannot be challenged under the Fourth Amendment unless there is a completed seizure (that is a restraint on the individual's freedom to leave), accomplished by means of physical force or a show of authority. During the initial stages of the pursuit at issue here, plaintiff was not restrained at all. Rather than submitting to the show of authority, the plaintiff chose to flee. During the latter stages- when the plaintiff crashed- he was tragically not free to walk away. This restraint on the plaintiff's freedom to leave, however, was not accomplished by the show of authority but occurred as a result of the plaintiff's decision to disregard it. 801 F 2d at 203.

The Sixth Circuit employed the Galas rationale in a case wherein individuals fleeing a crime scene were confronted by identified police officers, who ordered the suspects to halt and fired two shots at the fleeing suspects who disregarded the command. The foot pursuit continued until one of the suspects ran on to a high speed highway and was struck by a car and killed. Cameron v City of Pontiac, Michigan 813 F 2d 782 (CA 6, 1987). The Court [1] noted that the firing of a bullet while designed to stop the individual, did not stop or in any way restrain him. Finally the Court found that the use of deadly force standing alone does not constitute a seizure absent actual physical restraint or seizure, nor can alleged unreasonable conduct "serve as a basis for a 1983 cause of action anchored in the Fourth Amendment". 813 F 2d at 785. See also,

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[1] It is interesting to note that Judge Ryan joined in the Court's opinion. Judge(then Justice) Ryan authored the opinion of People v Shabaz 424 Mich 42 (1985), the decision deemed controlling by the Michigan Court of Appeals in the instant case.

Jones v Sherrill 827 F 2d 1102 (CA 6, 1987), Brower v County of Inyo 817 F 2d 540, 546 (CA 9,1987) [In a twenty mile vehicular chase, the Ninth Circuit found no seizure due to official restraint; rather, the pursuit was an exercise of autonomy to avoid official restraint. "We see no need to stretch the fourth amendment seizure to provide another theory for a tort claim which involves intentional conduct by both the victim and the defendants. That conduct can be fully evaluated under ordinary tort principles without any need to reach out for a bizarre definition of 'seizure'."] 817 F 2d at 546.

CONCLUSION

In the instant case,the officers were in a standard police vehicle, and the Michigan Court of Appeals found that the Respondent began running upon sighting the police car. The Michigan Court of Appeals found that the pursuit was not justified by reasonable suspicion and that the abandonment of the drugs was the unlawful fruit of the improper pursuit. For the reason that the Fourth Amendment proscription against unreasonable search and seizures is not implicated until there has been a seizure of the person, and for the reason that the Fourth Amendment proscription against unreasonable searches and seizures is not implicated until there has been a search, and for the reason that reasonable suspicion to conduct an investigatory stop did exits, the Michigan Court of Appeals should be reversed.

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ALS/hdm

AMICUS CURIAE

BRIEF

⑤

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No. 86-1824

In the Supreme Court of the United States

OCTOBER TERM, 1987

PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

v.

MICHAEL MOSE CHESTERNUT

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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38 [illegible]

QUESTIONS PRESENTED

1. Whether the simple pursuit of an individual who flees at the sight of a police officer amounts to a temporary investigative detention under *Terry v. Ohio*, 392 U.S. 1 (1968).

2. Whether flight from an identifiable police officer gives rise to a reasonable suspicion, justifying a temporary investigative detention.

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*ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MICHIGAN*

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents questions regarding the role of the Fourth Amendment when police pursue an individual who flees as the police approach. The questions raised by this case are important to law enforcement agencies generally, and their resolution is likely to have an impact on federal agencies responsible for enforcing narcotics and firearms laws. The resolution of those questions is also likely to affect the activities of law enforcement agencies in the District of Columbia and on federal reservations, where federal agencies have general law enforcement responsibilities. Finally, the disposition of this case will have an indirect impact on federal prosecutions by affecting the admission in federal proceedings of evidence obtained as a result of the actions of local police.

STATEMENT

1. At approximately 12:30 p.m. on December 19, 1984, four Detroit police officers, riding in a marked police cruiser, were conducting routine patrol duties in metropolitan Detroit. As the patrol car approached the intersection of Shoemaker and St. Clair Streets, one of the officers saw a car pull over to the curb. A man got out of the car and walked over to respondent, who was standing alone on the corner of the intersection. When the patrol car was about half a block from the corner, respondent spotted the car, turned, and immediately began to run away. Pet. App. 3a; J.A. 13-14, 19, 20-21.

The officers followed respondent around the corner in their patrol car "to see where he was going" (J.A. 25). The cruiser quickly caught up with respondent and began "running parallel with him" (J.A. 21). At that point, respondent threw a number of packets to the ground. One of the officers, Kenneth Peltier, got out of the cruiser and picked up the packets, which contained a number of pills. Meanwhile, after discarding the packets respondent ran a few feet farther and stopped while Officer Peltier inspected the pills. Based on his experience as a paramedic, Officer Peltier concluded that the pills contained codeine. Respondent was then arrested for the possession of narcotics and was taken to the stationhouse. During an ensuing search incident to arrest, the police discovered another packet of pills in respondent's hatband, a packet containing heroin, and a hypodermic needle. J.A. 15-17, 22-26.

2. A preliminary hearing was held on April 3, 1985. Officer Peltier, who was the only witness, described the events of December 19. At the end of Officer Peltier's testimony, defense counsel moved to dismiss the charges on the ground that respondent had been unlawfully seized. The magistrate granted the motion and dismissed the complaint (J.A. 26-35). The magistrate concluded that the Fourth Amendment forbids police pursuit of an individual on the basis of flight alone, and he found that there were no other circumstances giving rise to a reasonable suspicion that respondent was involved in criminal activity (J.A. 33-34). The trial court upheld the magistrate's order (J.A. 2-10).

3. The Michigan Court of Appeals affirmed (Pet. App. 2a-8a). The court concluded that the "investigatory pursuit" of a fleeing individual amounts to a "stop" under *Terry* v. *Ohio*, 392 U.S. 1 (1968). The court also concluded that flight from the police does not by itself give rise to a reasonable suspicion necessary to justify a stop (Pet. App. 5a-6a). The court reasoned that "[c]ertainly, the fact that [respondent] ran may have aroused the officers['] general suspicion, but without some specific additional knowledge [respondent's flight] was insufficient to justify their pursuit and eventual stop" of respondent (*id.* at 7a). Finally, the court concluded that, because respondent's abandonment of the packets was "in direct response" to the officers' unlawful pursuit, the packets were properly suppressed (*id.* at 7a-8a). The Michigan Supreme Court thereafter denied petitioner leave to appeal (Pet. App. 9a-10a).

SUMMARY OF ARGUMENT

A. The Michigan courts labeled the police conduct in this case an "investigatory pursuit" and held that such conduct constitutes a "seizure" within the meaning of the Fourth Amendment. That conclusion, however, ignores the wide variety of forms that police pursuit of an individual can take. Pursuit, whether on foot or in a patrol car, often constitutes nothing more than surveillance, which has never been thought of as a "seizure," even if the person being followed knows that he is being "tailed." And even if the police catch up with the person being followed and question him, their encounter may constitute nothing more than on-the-scene questioning of a kind that is not regarded as a Fourth Amendment seizure. Thus, it is not enough to characterize the police conduct as a "pursuit" and to hold that it therefore implicates the Fourth Amendment. Instead, the courts must examine the entire course of police conduct to determine whether the police, through physical force or a show of authority, have restrained an individual's liberty to the extent that a reasonable person would not feel free to leave.

The "pursuit" undertaken in this case was no more menacing than surveillance or on-the-scene questioning. The officers did not accost or physically restrain respondent before he fled or during his flight. Nor did the officers invoke their authority to bring respondent to a halt. They did not order him to stop; they did not obstruct his path with their patrol car; and they did not use the car's flashing lights or siren to signal for him to stop. None of the officers displayed a weapon or threatened to use one if respondent continued to flee. The officers simply followed respondent and drove along beside him as he ran. Those actions are not the kinds of intimidating or coercive measures that are necessary to constitute a *Terry* stop.

B. Even assuming that the police conduct in this case constituted a *Terry* stop, it was lawful based on respondent's flight as the officers approached. Law enforcement officers regard flight as a suspicious circumstance warranting further investigation, because flight often indicates that a crime has been or is being committed, and that the person who is fleeing has some connection with it. The natural reaction that the police have to flight is also one that the criminal law has long deemed reasonable. While flight can be ambiguous and may not by itself supply probable cause for an arrest, probable cause is unnecessary for a *Terry* stop, which is justified if a police officer reasonably believes that criminal activity "may be afoot." The officers in this case reasonably concluded that respondent's unprovoked flight at the sight of their marked patrol car indicated that he may have possessed contraband or may have been involved in some other criminal activity. Respondent's flight therefore gave the officers sufficient grounds to conduct a *Terry* stop.

ARGUMENT

THE FOURTH AMENDMENT DOES NOT REQUIRE THE SUPPRESSION OF THE NARCOTICS RESPONDENT DISCARDED DURING HIS FLIGHT FROM THE POLICE

Respondent was not arrested until after Officer Peltier examined the packets that respondent discarded during his flight from the patrol car and concluded that they contained codeine. At that point, the police had probable cause to arrest respondent for the illegal possession of narcotics. Accordingly, unless the officers' prior actions violated the Fourth Amendment, the narcotics discarded by respondent, as well as the evidence obtained during the ensuing search incident to his arrest, were admissible as evidence.

The Michigan Court of Appeals' ruling that the officers' conduct violated the Fourth Amendment was based on two legal conclusions: *first*, that the pursuit of an individual who flees at the sight of a police officer is tantamount to a "stop" of that person under *Terry* v. *Ohio*, 392 U.S. 1 (1968), and therefore must be justified by a reasonable suspicion of criminal activity; and, *second*, that flight from a police officer does not by itself give rise to a reasonable suspicion of criminal activity. For the reasons that follow, we submit that both links in the court's reasoning are erroneous.[1]

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[1] We also disagree with the court's holding that discarding property during a police pursuit is involuntary as a matter of law and cannot amount to abandonment (Pet. App. 7a-8a). See, *e.g.*, *Smith* v. *State*, 333 So. 2d 91 (Fla. Dist. Ct. App. 1976); *People* v. *Boodle*, 47 N.Y.2d 398, 391 N.E.2d 1329, 418 N.Y.S.2d 352, cert. denied, 444 U.S. 969 (1979). Even when it is later determined that the police pursuit was unjustified

A. The Pursuit Of An Individual Who Flees At The Sight Of A Police Officer Does Not Without More Amount To A *Terry* Stop

The Michigan Court of Appeals ruled that the police conduct in this case constituted an "investigatory pursuit," which restricted respondent's freedom as soon as the pursuit began (Pet. App. 5a). The court therefore held that the pursuit was a "seizure" within the meaning of the Fourth Amendment and could be justified only if the police reasonably suspected that respondent was engaged in criminal activity. That conclusion ignores the wide variety of police conduct that is subsumed within the term "pursuit," much of which does not constitute a "seizure" at all.

1. *Police surveillance and the questioning of a pedestrian do not amount to a "search" or a "seizure" under the Fourth Amendment*

The question whether police pursuit of someone in flight amounts to an unlawful "seizure" touches on two well-established law enforcement practices, surveillance and on-the-scene questioning, which the police often employ when they encounter suspicious conduct. Neither practice ordinarily implicates the Fourth Amendment. The reason is that the Fourth Amendment does not regulate police activity that is neither a "search" nor a "seizure," and surveillance

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because it was not based on a sufficient level of reasonable suspicion, the suspect's decision to discard property, such as narcotics or weapons, during the pursuit may be an act of sufficiently independent free will that the items should not be subject to suppression if they are subsequently recovered by the police. The State did not separately present that question in its petition, however, and we have therefore not addressed it here.

and questioning ordinarily do not fit within either category.

In *United States* v. *Knotts*, 460 U.S. 276 (1983), this Court made clear that police surveillance does not constitute a search under the Fourth Amendment. There, law enforcement authorities tracked a person suspected of being involved in narcotics through a combination of visual surveillance and monitoring an electronic tracking device previously installed in a container the person was transporting. The Court ruled that monitoring a suspect's whereabouts through the use of such electronic equipment was not a search, because the device revealed no information that could not equally have been gleaned through sustained visual observation of his journey. And the latter practice, the Court explained, has long been held not to constitute a search. 460 U.S. at 281-285. Accord *United States* v. *Karo*, 468 U.S. 705, 713-714 (1984).

The Court has likewise established that on-the-scene questioning ordinarily does not implicate the Fourth Amendment. In *Terry* v. *Ohio*, *supra*, the Court held that a law enforcement officer may stop an individual and briefly detain him for questioning if the officer has a reasonable suspicion that the individual is connected with criminal activity. 392 U.S. at 21-22. But *Terry* also made clear that interactions between a police officer and an individual short of a formal "stop" are lawful even if the officer lacks a reasonable suspicion that criminal activity may be afoot. The Court found it "obvious[]" that "not all personal intercourse between policemen and citizens involves 'seizures' of persons." *Id.* at 19 n.16. An encounter becomes a seizure only when "a police officer accosts an individual and restrains his freedom to walk away." *Id.* at 16. As the Court explained, "[o]nly when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may [a court] conclude that a 'seizure' has occurred." *Id.* at 19 n.16.[2]

In several decisions since *Terry*, the Court has sought to clarify the distinction between a stop and an encounter falling short of a stop. In *United States* v. *Mendenhall*, 446 U.S. 544 (1980), two Members of the Court concluded that "a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." 446 U.S. at 554 (opinion of Stewart, J.) (footnote omitted). Applying that standard to the facts, Justices Stewart and Rehnquist found that Mendenhall had not been "seized," since the agents did no more than ask her for identification and for her airline ticket. *Id.* at 555. A majority of the Court later approved that standard in separate opinions in *Florida* v. *Royer*, 460 U.S. 491 (1983), and found that similar actions by the officers did not amount to a *Terry* stop. 460 U.S. at 497, 501 (plurality opinion); *id.* at 514 (Blackmun, J., dissenting); *id.* at 523 n.3 (Rehnquist, J., dissenting). See also *Florida* v. *Rodriguez*, 469 U.S. 1, 5-6 (1984). Finally, in *INS* v. *Delgado*, 466 U.S. 210 (1984), the Court expressly held that simple questioning by a law enforcement officer does not, without more, amount to a seizure. 466 U.S. at 216-217, 219-221. As the Court explained in *Delgado*, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response. Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment." *Id.* at 216 (citation omitted). See generally 3 W. LaFave, *Search and Seizure* § 9.2 (h), at 405-414 (2d ed. 1987).

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[2] *Terry* itself provided only limited guidance for determining when "personal intercourse between policemen and citizens" has become a "stop." The Court found that Terry had been seized when he was taken hold of, spun around, and patted down by a police officer (392 U.S. at 19), but the Court did not decide whether Terry had been restrained prior to that time, even though he had been approached by the officer and asked to supply some identification (*id.* at 19 n.16). Nonetheless, two members of the Court explained in concurring opinions that police questioning is not tantamount to a seizure if an individual is free "to ignore his interrogator and walk away." *Id.* at 33 (Harlan, J., concurring); *id.* at 34 (White, J., concurring). In *Sibron* v. *New York*, 392 U.S. 40 (1968), a companion case to *Terry*, the Court again was was unable to discern from the record whether Sibron had been seized when a police officer approached him in a restaurant and told him to come outside. The Court indicated, however, that the proper test was whether Sibron had accompanied the officer "voluntarily in a spirit of apparent cooperation," rather than in submission to a "show of force or authority which left him no choice" *Id.* at 63.

Implicit in *Terry*, *Mendenhall*, *Royer*, and *Delgado* is the recognition that a seizure does not occur whenever a police officer identifies himself as such upon approaching an individual, even though doing so may be equivalent, in a broad sense, to a "show of authority," and notwithstanding that few people will feel they can walk away or ignore the officer. The average pedestrian will feel some sense of responsibility to cooperate with brief questioning or a request for identification by the police, out of a sense of civic duty, an obligation to defer to authority, or a belief that a refusal to cooperate will focus suspicion on him. *Model Code of Pre-Arraignment Procedure* § 110.1 commentary at 259 (Proposed Official Draft 1975) [hereinafter *Model Code*]. Regardless of its psychological or sociological wellsprings, however, voluntary cooperation with the police does not constitute the type of intrusion that implicates the protection of the Fourth Amendment. See *INS* v. *Delgado*, 466 U.S. at 216. As Professor LaFave has explained, the police, "without having later to justify their conduct by articulating a certain degree of suspicion, should be allowed 'to seek cooperation, even where this may involve inconvenience or embarrassment for the citizen, and even though many citizens will defer to this authority of the police because they believe—in some vague way—that they should' " cooperate with law enforcement authorities. 3 W. LaFave, *supra*, § 9.2(h), at 411 (footnote omitted) (quoting *Model Code* § 110.1 commentary at 258). For that reason, "if 'the moral and instinctive pressures to cooperate are in general sound and may be relied on by the police,' then a street encounter does not amount to a fourth amendment seizure merely because of those pressures—that is, merely because the other party to the encounter is known to be a policeman." 3 W. LaFave, *supra*, § 9.2(h), at 411-412 (footnotes omitted) (quoting *Model Code* § 110.1 commentary at 258).

That conclusion is consistent with what *Terry* saw as "the central inquiry under the Fourth Amendment —the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security." 392 U.S. at 19. Application of the standard enunciated in *Terry* requires balancing the interest in " 'prevent[ing] arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals' " and "the acknowledged need for police questioning as a tool in the effective enforcement of the criminal laws." *United States* v. *Mendenhall*, 446 U.S. at 553-554 (opinion of Stewart, J.) (citation omitted); see *Brown* v. *Texas*, 443 U.S. 47, 50 (1979); *Pennsylvania* v. *Mimms*, 434 U.S. 106, 109 (1977). In the context of on-the-scene questioning, the privacy and liberty safeguarded by the Fourth Amendment are not threatened by allowing a police officer to rely on the natural willingness of most persons to cooperate with law enforcement authorities. And the practice of conducting routine questioning without forcible detention is an extremely valuable weapon in the prevention and detection of crime. The intrusion occasioned by the approach and questioning of a pedestrian by the police is therefore one that society is willing to accept as reasonable even in the absence of any suspicion that the person approached is guilty of wrongdoing.

2. *Police pursuit of an individual in flight does not invariably amount to a stop and may be no more intrusive than surveillance or questioning*

The Fourth Amendment analysis of surveillance and on-the-scene questioning makes it clear that it is wrong to treat all forms of police "pursuit" alike. The police will not always chase a person in flight with their "siren blaring" (*Commonwealth* v. *Thibeau*, 384 Mass. 762, 764, 429 N.E.2d 1009, 1010 (1981)), they will not necessarily "spr[i]ng from their car and over[take]" a suspect "under circumstances that make it seem that some form of detention is imminent" (*State* v. *Saia*, 302 So. 2d 869, 873 (La. 1974), cert. denied, 420 U.S. 1008 (1975)), and they will not invariably "pull alongside [an individual], * * * reach[] out and grab[]" and forcibly restrain him (*Commonwealth* v. *Thibeau*, 384 Mass. at 763, 429 N.E.2d at 1010), which are the types of circumstances that have persuaded some courts to treat police pursuit as a *Terry* stop from the outset of the chase. "Pursuit" may consist of nothing more than following someone as he runs away from a police cruiser, a circumstance that far more closely resembles traditional police surveillance than a *Terry* stop. But see *In re D.J.*, No. 85-870 (D.C. Oct. 19, 1987), slip op. 2; *People* v. *Thomas*, 660 P.2d 1272, 1273-1274 (Colo. 1983).

The actions that the police follow in pursuing a suspect are no less diverse than other types of encounters between the police and the public that occur daily. Some forms of police pursuit will culminate in a *Terry* stop once a person is overtaken, if the police forcibly detain him. Some will amount to a stop from the outset or from an early point in the chase, if the police command the person to halt and indicate that he is not free to go. But that will not be true in every case in which the police follow an individual. In some cases, conduct that can be termed "pursuit" does not constitute a seizure at all—when, for example, the pursuit amounts to nothing more than surveillance. Even when the police catch up with the person being followed, their conduct will often involve nothing more threatening than the typical approach of an officer to a pedestrian for the purpose of asking him questions. To consider such conduct a "seizure" is to deprive the term of any real meaning and to be unfaithful to this Court's decisions on surveillance and police questioning.

The correct approach, accordingly, is to examine the entire course of police conduct from the moment the police begin to follow the individual until the encounter is brought to a close, either when the person is arrested or when he walks away. Whether and when a stop has occurred turns on when, if at all, the police exercise force or a show of authority to restrain the individual, or when the circumstances of the encounter become so intimidating that a reasonable person would believe that he is not free to leave.

In determining whether an individual has been "seized," a court must disregard the individual's subjective sense of compulsion when he is being pursued by the police. Just as a pedestrian who is approached by the police may believe that he should answer their questions, so too a person who is followed by the police may conclude that he should not ignore the officers' presence. In both cases, the person may feel inhibited in going about his business, even though the police have not taken action that in any way objectively restricts his freedom. The individual's subjective assessment of his options should not determine whether the police have "seized" him by approaching him for questioning or following him as he flees. There should be no difference for this purpose between cases in which a person is stationary and cases in which he is moving when he is approached by the police. Some additional "intimidating" circumstance (*INS* v. *Delgado*, 466 U.S. at 216) beyond mere pursuit—such as a show of authority or the use of force—should be required to constitute a *Terry* stop.

3. *The pursuit of respondent did not constitute a stop*

The officers violated no Fourth Amendment interest of respondent's simply by watching him as a man got out of a parked car and walked over to respondent on the corner. Nor did the officers act improperly by approaching the corner itself. Respondent was standing on a public street, and the officers were free to observe his actions or to approach him to ask him questions. After respondent left the corner, the officers would not have acted unlawfully by following respondent from a distance in order to keep track of his whereabouts. That sort of police conduct—the very essence of surveillance—raises no Fourth Amendment question. *United States* v. *Knotts*, *supra*.

Only two factors distinguish this case from that one: Respondent believed that the officers saw him, and by fleeing once he saw the marked patrol car, respondent prevented the officers from taking any step short of a chase to learn what prompted his flight and where he was heading.

The first factor is irrelevant. It cannot be the case that what is known in the vernacular as a "tail" becomes a "seizure" once the person under surveillance realizes that he is being followed. The second factor is also insufficient to constitute a stop. The limited steps that the officers took to "see where [respondent] was going" (J.A. 25) bore none of the earmarks of a traditional *Terry* stop. Respondent was not accosted by Officer Peltier or his partners. On the contrary, the officers were a half-block from the street corner where respondent was standing when he ran from their patrol car. The officers did not physically restrain respondent. Indeed, the reason the officers followed respondent was that he fled once he spotted their patrol car, and respondent stopped running of his own accord while Officer Peltier retrieved the discarded packets of codeine. The officers also did not invoke their authority as law enforcement agents to prevent or attempt to prevent respondent from leaving the street corner. They did not order him to halt; they did not obstruct his path with their patrol car; and they did not use the patrol car's overhead flashing lights or siren to signal for him to stop. Finally, none of the officers displayed a weapon or threatened to use one if respondent continued to flee. All the officers did was to follow respondent and drive along parallel to him as he ran.[3]

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[3] Conduct having more elements of coercion than the conduct in this case has been held not to constitute a stop. See, *e.g.*, *INS* v. *Delgado*, 466 U.S. at 219-221 (agent tapped individual on the shoulder to get his attention and then questioned individual); *Martinez* v. *Nygaard*, No. 85-4327 (9th Cir. Nov. 2, 1987), slip op. 10 (same); *United States* v. *$73,277, United States Currency*, 710 F.2d 283, 288-289 (7th Cir. 1983) (agent walked alongside individual, identified himself as a federal officer, and asked if he could speak with the individual); *United States* v. *Burrell*, 286 A.2d 845, 846 (D.C. 1972) (officer placed his hand on person's elbow and said, "Hold it, sir, could I speak with you for a second?"); *People* v. *King*, 72 Cal. App.3d 346, 349, 139 Cal. Rptr. 926, 926 (1977) (officer called out to person walking away from a group, "Danny, stop, I want to talk to you"); *People* v. *Long*, 99 Ill.2d 219, 457 N.E.2d 1252 (1983) (officer followed an individual's truck in his patrol car without activating his siren or flashing lights and the person in the truck pulled over to the side of the road); *State* v. *McGee*, 381 N.W.2d 630, 631 (Iowa 1986) (officers pulled their car behind an individual's parked car as he was about to enter it, and the officers shouted the individual's name); *State* v. *Sheffield*, 62 N.J. 441, 303 A.2d 68, cert. denied, 414 U.S. 876 (1973) (officer called over to defendant from a patrol car; when defendant walked quickly away, the officer followed him and again called his name).

It is likely that respondent believed that it was not safe to remain on the corner because he was in possession of narcotics at the time. And he may well have anticipated, when the patrol car was driving parallel to him as he ran, that the officers were about to stop and apprehend him. It is probably also true that respondent believed that it was useless to try to escape once Officer Peltier retrieved the packets that respondent had discarded. But regardless of his subjective impressions, respondent was free throughout —in the sense contemplated by *Terry*—to act as he chose: to remain on the street corner, to walk away, or even to run. 392 U.S. at 19 n.16. As it happens, respondent first decided to flee and then decided to give up the ghost, all in response to the mere presence and simple pursuit of the police officers. Those two actions by the officers, we submit, fall well short of the type of intimidating or coercive action that is necessary to constitute a *Terry* stop.

B. A Person's Unprovoked Flight From A Police Officer Gives Rise To A Reasonable Suspicion Of Criminal Activity And Justifies A Temporary Investigative Stop By The Police

The Michigan Court of Appeals ruled that "flight from the police alone does not provide the reasonable suspicion necessary to justify" a *Terry* stop (Pet. App. 6a). That conclusion, too, is in error. Even if the officers are deemed to have seized respondent by their pursuit or by some other action during the course of respondent's flight, respondent's unprovoked flight from their marked patrol car gave rise to a reasonable suspicion that respondent was connected with criminal activity, justifying a temporary investigative detention for the purpose of questioning him.

1. *The police may reasonably treat flight as significant evidence of guilt*

Law enforcement officers treat flight as a suspicious circumstance that warrants further investigation. As one empirical study of police investigative practices concluded, "[c]ertainly, officers on patrol assume that flight is strong evidence of guilt. They almost always attempt to stop and question a person who flees from them, even though they suspect no specific crime." L. Tiffany, D. McIntyre, Jr., & D. Rotenberg, *Detection of Crime* 32 n.19 (1967). Ordinarily, the police will rely on a combination of factors in deciding whether to stop and question an individual, because often no one factor will enable an officer to determine both whether a crime has been (or will be) committed and by whom. The police treat flight differently, however, because it may appear to indicate both the existence of a crime and participation in it by the person who is fleeing. *Id.* at 19. For that reason, "[a] person who * * * changes his direction in an apparent attempt to avoid confronting a [police] officer, or who flees at the sight of an officer will commonly be detained and questioned." *Id.* at 32.

The natural reaction that law enforcement officers have to the flight of an individual is eminently reasonable. The roots of the principle that flight is evidence of guilt may be as deep as the observation that "[t]he wicked flee when no man pursueth: but the righteous are bold as a lion." *Proverbs* 28:1.

The criminal law has historically treated flight as evidence of guilt. More than 90 years ago, this Court endorsed the view that flight is probative of wrongdoing, concluding that "the law is entirely well settled that the flight of the accused is competent evidence against him as having a tendency to establish his guilt." *Allen* v. *United States*, 164 U.S. 492, 499 (1896). Although it is wrong to treat flight "under both divine and human law, [as] conclusive proof of guilt" (*Hickory* v. *United States*, 160 U.S. 408, 421 (1896)), "undoubtedly the flight of the accused is a circumstance proper to be laid before the jury, as having a tendency to prove his guilt" (*Alberty* v. *United States*, 162 U.S. 499, 510 (1896)). See generally 2 J. Wigmore, *Evidence* § 276, at 122 (Chadbourn rev. 1979) (footnote omitted) ("It is universally conceded today that the fact of an accused's flight * * * [is] admissible as evidence of consciousness of guilt, and thus of guilt itself."); 1 C. Torcia, *Wharton's Criminal Evidence* § 154, at 630-632 (14th ed. 1985). Accordingly, it is well settled that flight at the sight of a police officer, whether he is in plain clothes or in uniform, is significant evidence that a criminal undertaking is, was, or will soon be afoot. See, *e.g.*, *Husty* v. *United States*, 282 U.S. 694, 701 (1931); *Brinegar* v. *United States*, 338 U.S. 160, 166 n.7 (1949); *Peters* v. *New York*, decided together with *Sibron* v. *New York*, 392 U.S. 40, 66-67 (1968); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 884-885 (1975); *Florida* v. *Rodriguez*, 469 U.S. at 6; *United States* v. *Sharpe*, 470 U.S. 675, 705 (1985) (Brennan, J., dissenting); *United States* v. *Haye*, 825 F.2d 32, 34 (4th Cir. 1987); *United States* v. *Pope*, 561 F.2d 663, 668-669 (6th Cir. 1977); *United States ex rel. Richardson* v. *Rundle*, 461 F.2d 860, 864 (3d Cir. 1972), cert. denied, 410 U.S. 911 (1973); 2 W. LaFave, *supra*, § 3.6(e), at 62 & n.126; 3 *id.* § 9.3(c), at 448-451 & nn.150, 154, & 156.

This Court made that point expressly in *Peters* v. *New York*, *supra*. There, the Court considered the significance of flight from an off-duty police officer in civilian clothes. 392 U.S. at 48. The officer heard noises at the door of his apartment, and on investigation he saw two men he did not know tiptoeing furtively in the hall. They took flight when the officer appeared. The Court found that the officer's observations amounted to probable cause for an arrest, rather than simply a reasonable suspicion. Chief Justice Warren wrote for the Court (392 U.S. at 66-67 (footnote omitted)):

> It is difficult to conceive of stronger grounds for arrest, short of actual eyewitness observation of criminal activity. As the trial court explicitly recognized, deliberately furtive actions and flight at the approach of strangers or law officers are strong indicia of *mens rea*, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest.

2. *The ambiguous nature of flight in some instances does not render unreasonable a police officer's reliance on flight as an indication that criminal activity may be afoot*

The courts that have refused to treat flight as a justification for a *Terry* stop have reasoned that flight by itself is often ambiguous, since it may have been inspired by a number of entirely innocent motives, such as a dislike of authority, a fear of harassment or brutality at the hands of police, or a concern at the prospect of being mistakenly apprehended as the guilty party. *E.g., In re D.J.*, slip op. 8-9 & n.4; see *United States* v. *Green*, 670 F.2d 1148, 1152 (D.C. Cir. 1981); *Hinton* v. *United States*, 424 F.2d 876, 879 (D.C. Cir. 1969) (flight alone does not amount to probable cause). These courts have required that flight be corroborated by some other additional suspicious circumstance in order to justify the inference that criminal activity may be afoot. *E.g., In re D.J.*, slip op. 9-10; *People* v. *Shabaz*, 424 Mich. 42, 59, 378 N.W.2d 451, 459 (1985), cert. dismissed, No. 85-1265 (July 7, 1986); see *United States* v. *Green*, 670 F.2d at 1152.[4]

It is true that there are circumstances in which flight may be ambiguous. Those circumstances are illustrated by *Wong Sun* v. *United States*, 371 U.S. 471 (1963). In that case, a narcotics officer affirmatively misrepresented his purpose for being on the suspect's premises at 6 a.m. and did not dispel the misimpression created by his own ruse before the suspect fled. Moreover, the officer had no reason to believe that the suspect had committed a crime other than the tip of a previously untested informant, and it was not even clear that the man at the door was the person named by the informant. Under these circumstances, the Court found that the suspect's flight did not supply probable cause sufficient to justify breaking open the suspect's door and following him to the bedroom where his wife and child lay sleeping. *Id.* at 474. The Court concluded that the suspect's flight was "ambiguous" conduct that "signified a guilty knowledge no more clearly than it did a natural desire to

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[4] In some cases, courts have ruled that the police may not rely on a person's flight to justify a *Terry* stop if his flight was a response to prior unlawful police conduct. *Johnson* v. *United States*, 468 A.2d 1325, 1328 (D.C. 1983); *Commonwealth* v. *Thibeau*, 384 Mass. at 764, 429 N.E.2d at 1010. No such claim could be made in this case, since respondent fled immediately upon the approach of the patrol car, before the police took any action at all.

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repel an apparently unauthorized intrusion." *Id.* at 483 (footnote omitted).

Wong Sun does not support the proposition that flight can never amount to a reasonable suspicion. *Wong Sun* involved not a stop but an arrest (and a particularly intrusive one). The significance of the suspect's flight was therefore measured against the higher standard of probable cause, which is unnecessary for a *Terry* stop. In making a *Terry* stop, a police officer is not required to eliminate all innocent explanations for a suspect's behavior, or even to determine that his actions are more likely to be culpable than innocent.[5] Rather, an officer may act when he "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity *may be* afoot" (*Terry* v. *Ohio*, 392 U.S. at 30 (emphasis added)). That standard demands only "some minimum level of objective justification to validate the detention or seizure" (*INS* v. *Delgado*, 466 U.S. at 217). See also *United States* v. *Cortez*, 449 U.S. 411, 418 (1981); *Illinois* v. *Gates*, 462 U.S. 213, 230-232 (1983); *Texas* v. *Brown*, 460 U.S. 730, 742 (1983) (plurality opinion).[6] Moreover, the fac-

tors supporting a finding of reasonable suspicion must be viewed in light of the inferences and deductions that a trained and experienced officer would make, "inferences and deductions that might well elude an untrained person." *United States* v. *Cortez*, 449 U.S. at 418; *United States* v. *Mendenhall*, 446 U.S. at 563 (opinion of Powell, J.); *Brown* v. *Texas*, 443 U.S. at 52 n.2 (a trained, experienced officer "is able to perceive and articulate meaning in given conduct which would be wholly innocent to the untrained observer"). This Court's conclusion in *Wong Sun* that, on the facts of that case, the suspect's flight was ambiguous and did not provide probable cause hardly supports the proposition that flight is always ambiguous and can never amount to a reasonable suspicion. Even in *Wong Sun*, the question of the probative force of the suspect's flight was a close one: four Justices thought that the suspect's flight under the circumstances satisfied even the higher standard of probable cause. *Wong Sun*, 371 U.S. at 500-503 (Clark, J., dissenting).[7]

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[5] Indeed, even the probable cause standard for an arrest does not require that it be more likely than not that a person has committed a crime; only a "fair probability" of criminality is necessary. *Illinois* v. *Gates*, 462 U.S. 213, 235, 238, 243-244 n.13 (1983). In fact, the reasonable doubt standard applicable at trial does not require a court to find that the evidence is inconsistent with some conceivable hypothesis of innocence. *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

[6] See 3 W. LaFave, *supra*, § 9.3(b), at 431 ("it would seem clear [from *Terry*] that a more-probable-than-not standard is never applicable to a brief stopping for investigation"); *id.* at 432 & n.58 (collecting cases in which courts "quite properly" upheld a *Terry* stop even though the actions observed were consistent with innocent activity).

[7] This Court's decision in *Alberty* v. *United States*, *supra*, is sometimes cited as authority for the proposition that flight alone cannot give rise to probable cause or a reasonable suspicion of criminal activity. See *Hinton* v. *United States*, 424 F.2d at 879 n.8; *In re D.J.*, slip op. 8-9 & n.4. But the holding in *Alberty* has no bearing on this issue. In that case, as in *Hickory* v. *United States*, 160 U.S. at 422-423, and *Starr* v. *United States*, 164 U.S. 627 (1897), the Court ruled that the jury may not be instructed at trial on a defendant's flight in terms that treat flight as a conclusive presumption of guilt, because the defendant's flight may have an entirely innocent explanation. *Alberty*, 162 U.S. at 511. The principle that flight

It may often be the case that there is an innocent explanation for an individual's flight. The magistrate suggested that allowing "flight" to justify a *Terry* stop would enable the police to stop "joggers" at will (J.A. 33). While it is implausible to believe that respondent sprinted away from the officers just to go for a jog, that possibility could be present in other cases. A principal function of police investigative work, however, is to resolve such ambiguities to determine whether observed behavior is suspicious. The possibility that there may be an innocent explanation for conduct that "may * * * arouse[] the officers['] general suspicion" (Pet. App. 7a) should not disable the police from undertaking the limited investigative activity that *Terry* and its offspring have recognized as a necessary and legitimate means of preventing or detecting crime.

3. *Respondent's unprovoked flight justified an investigative detention for the purpose of questioning*

If respondent had remained standing on the corner of Shoemaker and St. Clair Streets, or if he had simply walked away, he likely would not have aroused suspicion where it did not otherwise exist. But respondent did more than stand still or just walk away; he turned and ran away from the officers' patrol car. Nothing in this Court's decisions remotely suggests that a person's constitutional right to go on his way prohibits the police from drawing inferences from the manner in which he exercises that right.

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does not invariably indicate guilt, however, is not inconsistent with a police officer's judgment that flight is suspicious in a particular case, because flight is not required conclusively to establish guilt before an officer is entitled to make a *Terry* stop.

If flight ordinarily has some probative value, as this Court has held, it is not difficult to conclude that the stop of respondent in this case was supported by a reasonable suspicion that he was connected with criminal activity. As noted above, a reasonable explanation for respondent's flight from the officers was that he believed it was no longer "safe" to stand on the corner because the officers were approaching, and he may have felt uncomfortable remaining on the corner if he possessed some type of contraband or a weapon. Unprovoked flight from an identifiable police officer is not only a suspicious circumstance, but it is one that is not likely to "describe a very large category of presumably innocent travelers" (*Reid* v. *Georgia*, 448 U.S. 438, 441 (1980)). To be sure, it was possible that in spite of respondent's suspicious behavior, no crime had been committed. But the fundamental lesson of *Terry* is that a stop is justified when crime "may be afoot"; the officers need not have probable cause to believe that an offense has been committed.

Consider the alternative. Must the police, while routinely patrolling a neighborhood, sit by impassively when someone spies a patrol car, turns, and runs away for no apparent reason? To paraphrase *Terry*, it would be poor police work indeed for four police officers simply to shrug their shoulders and fail to investigate that conduct further. 392 U.S. at 23; see also *Adams* v. *Williams*, 407 U.S. 143, 145-146 (1972).[8] "There is no war between the Constitution and common sense" (*Mapp* v. *Ohio*, 367 U.S. 643, 657 (1961)), and the Constitution should therefore demand no such illogical and unfortunate result.

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[8] As Illinois Supreme Court Justice Walter Schaefer put it (3 W. LaFave, *supra*, § 9.3(b), at 433 n.60, quoting W. Schaefer, *The Suspect and Society* 41-42 (1967)): " 'When writing opinions I have often been tempted to state the test of the reasonableness of a police officer's conduct in terms of what

CONCLUSION

The judgment of the Court of Appeals of Michigan should be reversed.

Respectfully submitted.

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the reaction would have been if he had not done what he is charged with having done wrongfully. "If you would fire the officer for not doing what he did, then what he did was reasonable." * * * I agree that it isn't a very stylish way of expressing the concept of reasonableness, and that somewhat circular reasoning is involved. But to me there is value in restating the question so that the whole problem may be seen.' "

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AMICUS CURIAE

BRIEF

(6)

Supreme Court, U.S.
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No. 86-1824

In The
Supreme Court of the United States
October Term, 1987

PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,

v.

MICHAEL MOSE CHESTERNUT,
Respondent.

On Writ of Certiorari to the
Court of Appeals of the State of Michigan

BRIEF AMICI CURIAE OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., JOINED BY THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC., AND THE NATIONAL SHERIFFS' ASSOCIATION, IN SUPPORT OF THE PETITIONER.

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. John D. O'Hair, Prosecuting Attorney, Wayne County, Michigan, Counsel for the Petitioner, and Carole M. Stanyar, Esq., Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court.

INTEREST OF AMICI

Americans for Effective law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* seventy-nine times in the Supreme Court of the United States, and thirty-six times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 67 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National Sheriffs' Association (NSA), is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

AELE, IACP, and NSA are national associations, and their perspective is broad. This brief concentrates on policy issues, including the values served by the common law right of police officers to investigate suspicious circumstances, and the need to give law enforcement agencies clear guidance with respect thereto. Although Petitioner is clearly represented by capable and diligent counsel, no single party can completely develop all relevant views of such issues as these. We speak on behalf of law enforcement officers and law enforcement administrators nationally.

ARGUMENT

THE FOURTH AMENDMENT IS NOT IMPLICATED WHEN THE POLICE SIMPLY RUN AFTER A PERSON, WHO HAS RUN AT THE SIGHT OF THEM, WITHOUT ANY ACTUAL RESTRAINT ON THE FREEDOM OF MOVEMENT OF THAT PERSON BY PHYSICAL FORCE OR SHOW OF AUTHORITY, SO THAT EVIDENCE OF A CRIME THROWN TO THE GROUND BY THE PERSON CAN BE CONSIDERED ABANDONED PROPERTY.

The Respondent (hereinafter referred to as "defendant") was standing on a street corner talking with another man when a marked police car appeared at the corner on routine patrol. Upon seeing the police car, defendant started running and the police pursued him in their patrol car. During his flight the defendant threw something on the ground and then stopped. The object thrown turned out to be packets. Upon recovery of the packets thrown down by the defendant, the police determined that they contained suspected drugs and defendant was then placed under arrest.

Based on these facts, the Court of Appeals of Michigan held that the police officers did not have a reasonable belief that criminal activity was afoot when they observed defendant start to run after seeing their automobile, so that the packets dropped by the defendant while being pursued by the officers were obtained illegally. *People v. Chesternut*, 157 Mich. App. 181, 403 N.W.2d 74 (1987).

Amici will not duplicate the case law analysis presented by the Petitioner in this case, although we do agree with it. Instead, we concentrate upon issues of policy that concern our law enforcement constituency. We speak from the perspective of police officers who daily have *thousands* of encounters with citizens in public places, not all of which rise to the level of detentions for investigation sanctioned by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968) and *United States v. Cortez*, 449 U.S. 411 (1981).

It has long been recognized that street contacts and encounters between citizens and the police are an essential function of police foot and vehicular patrol. *See, e.g.*, the memorandum by the Superintendent of the Chicago Police Department, quoted in L. Tiffany, D. McIntyre & D. Rotenberg, Detection of Crime 16 (1967).

Amici know from experience that without such contacts and encounters police officers would be largely powerless to function in spontaneous investigations of suspicious circumstaces.

What are some of the types of street contacts and encounters that police officers frequently make? Some common ones are these:

(1) police officers will follow and/or walk up to persons on the street and exchange greetings or make a casual remark;

(2) police officers will walk briskly or run after or parallel to persons walking briskly or running on the street, in order to determine why the person is walking briskly or running;

(3) police officers will follow a car to observe it and its occupants;

(4) police officers will drive alongside a car or a pedestrian for the same reasons.

Amici submit that none of these activities rise to the level of constitutional significance requiring probable cause or reasonable suspicion. In short, they do not involve *any* level of Fourth Amendment restraint, i.e., "seizure." Our position was clearly recognized by this Court in *United States v. Mendenhall*, 446 U.S. 544 (1980), when the Court stated:

> We adhere to the view that a person is "seized" only when, by means of physical force or show of authority, his freedom of movement is restrained. Only when such restraint is imposed is there any foundation whatever for invoking constitutional safeguards.

446 U.S. at 553-554. This rule was reiterated by the Court in *Florida v. Royer*, 460 U.S. 491 (1983), and *Florida v. Rodriguez*, 469 U.S. 1 (1984).

The facts of the instant case fit the rule. The police officers saw defendant run and they approached him. In order to do so, *they* had to move at the same speed he was moving at. In the process, the defendant threw away what turned out to be evidence of the commission of a crime. This was simple abandonment, *Abel v. United States*, 362 U.S. 217 (1960), *People v. Harris*, 15 Cal. App. 3d 498, 93 Cal. Rptr. 285 (1971), and the police were entitled to seize the items thrown.

If police officers were not able to do what the officers did in this case without reasonable suspicion, they could never approach a citizen to say "hello," "what are you doing," "is anything wrong," "can I help you?" etc., a position clearly rejected by this Court in *Mendenhall*, *Royer* and *Rodriguez*. As another court noted, ". . . such common social amenities and *pressures* do not and cannot in themselves amount to an official restraint [requiring probable cause or reasonable suspicion] on personal liberty." (emphasis added) *Login v. State*, 394 So.2d 183, 189 (Fla. App. 1981).

The situation might, indeed, be altogether different if a police officer were to walk up to or run up to a person and *command* that person to "stop" and answer questions. We do not deal with that case because it is not this case. The officers here simply pursued the defendant and in the process the defendant abandoned some property. Simply walking up to or running up to a person is not a Fourth Amendment restraint. However this Court might choose to rule on the question of whether a detention for investigation by police officers, who have chased a person and stopped and *held* such person because the person ran upon seeing them, requires a showing of reasonable suspicion, we submit that the Court should not disturb the established rule

that simple contacts and encounters, even if purposeful (as opposed to accidental) are not of constitutional significance. Even if the Court were to find that the conduct of the police in this case did rise to the level of a *Terry* stop for investigation, we submit that it should reaffirm the rule that simple contacts and encounters of the type we have described do not, consistent with the rationale of *Mendenhall*, *Royer* and *Rodriguez*, require reasonable suspicion.

Were the Court to rule otherwise, we respectfully submit that the bulk of street activity of police officers leading to the formation of reasonable suspicion and probable cause would come to an end, with consequent dire results for effective law enforcement.

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CONCLUSION

Amici do not request a specific disposition of the decision of the court below. We request simply that the Court reiterate the rule of *Mendenhall*, *Royer* and *Rodriguez*, that when police officers approach persons in public places, whether by walking, running, or driving a vehicle, their conduct, *to that extent*, and irrespective of the reaction of the person approached, is without constitutional significance.

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AMICUS CURIAE

BRIEF

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No. 86-1824

In The

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BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING URGING REVERSAL

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QUESTIONS PRESENTED

1) In the absence of the use of sirens, loudspeakers or flashers by a police officer in his or her vehicle, whether either of the following constitutes a seizure under the Fourth Amendment: (1) the pursuit of the respondent, a pedestrian who runs at the sight of the marked police car, or (2) the recovery of drugs abandoned by that person during his flight?

2) If there is a seizure of either person or property under the Fourth Amendment in this case, did the unprecipitated flight of the respondent upon sighting the marked police car constitute reasonable suspicion of criminal activity sufficient to justify an investigatory pursuit?

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No. 86-1824

In The
Supreme Court of the United States

October Term, 1987

THE PEOPLE OF THE STATE OF MICHIGAN,
Petitioner,
v.
MICHAEL MOSE CHESTERNUT,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

BRIEF FOR THE STATES OF ALABAMA, ALASKA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, KENTUCKY, LOUISIANA, MAINE, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEW JERSEY, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, TENNESSEE, UTAH, VERMONT, VIRGINIA, WASHINGTON, WEST VIRGINIA, WISCONSIN AND WYOMING URGING REVERSAL

STATEMENT OF INTEREST OF AMICI STATES

This case concerns both the rights of citizens in this country to be free of unreasonable search and seizure under the Fourth Amendment and the parameters within which state and local law enforcement officials conduct their responsibility to enforce the law. As representatives of their criminal justice systems, which start with a citizen's initial contact with a police officer and run through the final judgment of conviction or acquittal, the chief law enforcement officers of the *Amici* States can provide this Court with a unique insight into the impact of these questions on that system.

The constitutional questions raised by these facts go to a fundamental balance required between individual rights and the state's responsibility to enforce the law. There is no doubt that crime and the enforcement of our criminal laws have been and will continue to be an ever increasing problem in our society. As a free democracy, individual liberties are placed at the pinnacle of our value system. On the other hand, the enforcement of our criminal laws is essential to the maintenance of that free democratic society. The *Amici* States have a fundamental interest in ensuring that the proper balance is struck between reasonably protecting a citizen's constitutional rights and permitting effective enforcement of the laws by law enforcement officials.

STATEMENT OF THE CASE

On December 19, 1984, Kenneth Peltier, a police officer assigned to the 15th Precinct of the Detroit Police Department, was traveling with three partners in plain clothes in a marked police car on routine patrol in the vicinity of Shoemaker and St. Clair. The area contained some vacant buildings, a party store and an apartment building. There is no evidence in the record that this area

is a high crime or drug area. At about 12:30 p.m. on Shoemaker just east of St. Clair, Officer Peltier saw a 1977 Oldsmobile pull up to a curb about a block and a half away. A man left the car and began talking with another man standing on the corner later identified as the respondent.

When the respondent looked in the direction of the marked police car, he turned and began to run from it. At this point in time the police cruiser began to pursue[1] the respondent by pulling around the corner and starting up St. Clair. The officers were about one-half block away from the respondent when he began to run. Officer Peltier did not use a flasher, siren or loudspeaker to indicate to the respondent that he should stop.

Since the respondent was on foot running from the car and the officers were in the cruiser only one-half block away from the respondent when he began his flight, the officers never lost sight of the respondent. As the respondent continued running, he reached into his right hand pocket and threw a number of packets to the ground. When this event occurred, all of the officers were still in the car, and no visual or audible signals by the officers precipitated respondent's action.

As soon as the packets were thrown to the ground, the police cruiser stopped. Officer Peltier left the car, picked up the packets and inspected them. Due to his prior experience in hospitals and as a paramedic, Officer Peltier recognized the pills in the packets to be codeine. After the respondent threw the packets to the ground, he continued to run only about five feet and stood there as Officer Peltier inspected the pills. Based upon Officer Peltier's belief that the packets contained narcotics, Officer Peltier arrested the respondent for possession of narcotics. Up until this point in time, none of the officers detained the respondent from any freedom of movement.

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[1] Throughout this brief, the *Amici* States will use the term "pursue" as opposed to "follow". However, as is argued *infra* at pages 7-12, it is the contention of the *Amici* States that in the absence of the use of sirens, loudspeakers or flashers, the action of Officer Peltier should not be interpreted as a pursuit with the intention to detain the respondent.

The respondent was taken by the officers to the 15th Precinct Headquarters. A custodial search of the respondent yielded a package containing powder believed to be heroin and a hypodermic needle in the respondent's hat band. The respondent was charged with possessing heroin, codeine and diazepam in a complaint and warrant. All of the items were placed in lock sealed folders, which for purposes of examination only were stipulated to contain: (1) A hypodermic needle and .25 grams of heroin powder, (2) Eleven blue tablets identified as diazepam, (3) One white tablet identified as codeine, and (4) Other white tablets, for which there was no analysis.

On April 3, 1985, a preliminary hearing was held before Judge Longworth D. Quinn of the 36th District Court for the City of Detroit. The State moved to bind over on the charges contained in the complaint and warrant. The respondent moved to suppress the drugs as evidence and to dismiss the charges on the grounds that there had been an illegal search and seizure of the respondent. That motion was granted and subsequently affirmed by the Michigan Court of Appeals on October 17,

1986. The Michigan Supreme Court denied the State's application for leave to appeal on March 24, 1987.

SUMMARY OF ARGUMENT

Officer Peltier's pursuit of the respondent after his flight on foot upon sighting the marked police car did not constitute a seizure under the Fourth Amendment. Within the context of these facts, this Court has stated that a seizure of a person occurs if a reasonable person would have believed that he was not free to leave. The *Amici* States contend that the key to determining whether a seizure occurred in this case is the use of audible or visual signals to detain the respondent. Here, the officers used no sirens, loudspeakers or flashers. Common sense dictates to a reasonable person being pursued by a police car without the use of audible or visual signals that his or her freedom of movement has not been restricted.

To hold that pursuit is a seizure in the absence of audible or visual signals would severely restrict the police in performing their duties. The *Amici* States are not urging this Court to restrict any existing constitutional rights of individuals, but rather to consider the effect that an unwarranted expansion would have upon the ability of our police to enforce the law. To say that the respondent was seized by the pursuit of the police in this case would place blinders on law enforcement officials. Police would no longer be able to follow closely or conduct surveillance of any person exhibiting unusual activity, absent a clear reasonable suspicion of criminal activity.

Likewise, the recovery of the drug packets by the officers was not a seizure of that property. The recovery of abandoned property does not constitute a seizure under the Fourth Amendment. There is no doubt the respondent showed a clear intent to abandon the drugs by throwing them away in an open area. There was no attempt by the respondent to hide the drugs so as to recover them later. Unless ~~the~~ person has reason to believe that a police officer is pursuing him to force him to abandon contraband based upon prior harassing acts of the officer, the abandonment is voluntary, even though the person's acts may have been foolhardy.

Even if the pursuit in this case is a seizure, there were sufficient grounds to justify it. Flight by a person upon seeing a marked police car should be sufficient for the officer to pursue the individual to see if any criminal activity has or will occur. The amount of intrusion on the respondent is minimal at best and is outweighed by the state's interest in enforcing the law. If the Court disagrees that the facts show sufficient reasonable suspicion to justify the pursuit, then the *Amici* States urge a new standard for such pursuits; the *Amici* States propose a standard that requires less than if the officer had "stopped and frisked" the respondent. Specifically, the *Amici* States propose a test of a reasonable belief that the occurrence of an unusual activity might, upon further close visual surveillance, lead to additional facts that would constitute reasonable suspicion or probable cause.

ARGUMENT

I.

THE PURSUIT OF THE RESPONDENT BY THE POLICE CRUISER WITH NO AUDIBLE OR VISUAL SIGNALS TO DETAIN AND THE RECOVERY OF DRUGS ABANDONED BY THE RESPONDENT DID NOT CONSTITUTE A SEIZURE OF HIS PERSON OR PROPERTY UNDER THE FOURTH AMENDMENT.

A.

WHERE THE RESPONDENT WAS PURSUED BY A MARKED POLICE CAR THAT DID NOT USE ANY SIRENS, LOUDSPEAKERS OR FLASHERS TO INDICATE AN INTENTION TO THE RESPONDENT TO DETAIN HIM, A REASONABLE PERSON WOULD BELIEVE THAT HE OR SHE IS STILL FREE TO LEAVE, AND IS, ACCORDINGLY, NOT SEIZED UNDER THE FOURTH AMENDMENT.

The Fourth Amendment provides in pertinent part that "[t]he right of the people to be secure in their persons . . . against unreasonable search and seizure shall not be violated." The initial question to be considered in this case is whether the respondent or his property was "seized". Then the next step would be to determine whether the "seizure" was justified or not. This Court has stated that a "seizure" of a person by law enforcement officials does not violate the Fourth Amendment unless it is unreasonable. *United States v. Sharpe*, 470 U.S. 675 (1985) (The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only *unreason-*

able searches and seizures.) If, on the other hand, there was no "seizure" in this case, the inquiry ends.[2]

In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justice Stewart in a purality opinion[3] joined by Justice Rehnquist, defined the seizure of a person under the Fourth Amendment as follows:

> We conclude that a person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

Id. at 554. *See also, Immigration and Naturalization Service v. Delgado*, 466 U.S. 210 (1984)

Although this definition does provide a standard for determining when a seizure of a person occurs, it does not provide any concrete indicators as to when a reasonable person would believe that "he was not free to leave." Fortunately, Justice Stewart in *Mendenhall* did cite a number of circumstances that might indicate that a seizure has occurred even where the person did not attempt to leave:

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[2] Of course the "seizure" at this point is the "seizure" of the respondent. There would still remain the question of whether the drugs were seized or voluntarily abandoned during the pursuit. The *Amici* States argue *infra* at pages 12-15 that the abandonment was voluntary, and accordingly, there was no "seizure" of the drugs.

[3] A majority of the Court agreed that the question of whether a "seizure" occurred should not have been addressed by Justice Stewart because that issue was not considered by the lower court. However, there was no criticism of the standards set forth for seizure by Justice Stewart. *United States v. Mendenhall*, 446 U.S. at 560 (Powell, J., concurring) and at 566 (White, J., dissenting). The *Amici* States contend that the standards set forth by Justice Stewart are the correct constitutional standards in this case.

1) The threatening presence of several officers,
2) The display of a weapon by an officer,
3) Some physical touching of the person of the citizen, or
4) The use of language or tone of voice that compliance with the officer's request might be compelled.

United States v. Mendenhall, 446 U.S. at 554. None of these circumstances applies to this case; therefore, a reasonable person would believe that he was free to leave for the following four reasons.

First, there was no threatening presence of several police officers in this case. The fact that there were four plain clothes officers in a single marked police car does not constitute a threatening presence. If they did, then the mere presence of a marked police car would automatically be threatening. Society has not reached the point where the mere presence of a marked police car is threatening to a reasonable person. The fact that there were four officers instead of one in the car does not alter the conclusion. The result may be different under such different circumstances as, for example, if each officer had been in a separate car and four cruisers had converged on the respondent. But, as here, the mere existence of a marked police car with four plainclothes officers does not constitute a threatening presence.

Second, there was no display of any weapons by any officer in this case until after probable cause to arrest was established. None of the officers left the car during this incident until the packets of drugs were thrown to the ground. At that point in time, Officer Peltier left the vehicle to inspect the packets. Once he suspected that the packets contained narcotics then he arrested the respondent. There is no evidence in the record that Officer Peltier ever drew his gun before he determined that the packets contained suspected illegal drugs.

Third, there was no physical touching of the respondent until there was probable cause to arrest him for possession of narcotics. The officers did not "frisk" or "pat down" the respondent before he was arrested. In fact, the respondent voluntarily threw the packets of drugs to the ground and moved a distance of five feet away from the packets. Not until Officer Peltier determined that the packets contained suspected narcotics was the respondent touched, and he was then taken into custody on his arrest.

Fourth, the officers did not use any language or tone of voice that suggested compliance with the officers' request might be compelled. It is true that the officers in the police car pursued respondent as he ran so that they never lost sight of him. No sirens, loudspeakers or flashers were used by the officers to indicate to the respondent that he must halt. Moreover, no officer spoke or yelled to the respondent to stop.

It would have been very easy for the officers to indicate to the respondent to stop by using their siren, loudspeaker or flasher. In the absence of the use of those devices, a reasonable person would not believe that he or she was detained by the officers. Unlike a number of other circumstances, this case presents a clear and obvious standard for determining if a seizure has occurred. The use of siren, loudspeaker or flasher would be a clear and obvious indicator of seizure. When a police car follows

a person, there is no doubt that there may be a certain amount of concern by a citizen. But until the officer uses a siren, loudspeaker or flasher, a reasonable person knows that he or she is free to go.[4]

The actions of Officer Peltier constituted a visual surveillance of the respondent on a public thoroughfare, not a pursuit with the manifest intent to detain. In *United States v. Knotts*, 460 U.S. 276 (1983), Justice Rehnquist in the majority opinion held that the use of electronic beepers to aid in visual surveillance did not constitute a Fourth Amendment violation, implicitly recognizing that mere visual surveillance also does not constitute a seizure. In particular, Justice Rehnquist stated:

> A person travelling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.

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[4] Twenty-one states have laws that make it illegal to "willfully elude or flee a police officer after receiving a visual or audible signal from the officer to bring his motor vehicle to a stop." *See* ALA. CODE § 32-5A-193 (1975); ALASKA STAT. § 28.35.182 (1984); CALIF. VEH. CODE § 2800.1 (1987); COLO. REV. STAT. .§ 42-4-1512 (1984); CONN. GEN. STAT. ANN. § 14-223 (1987 Supp.); FLA. STAT. ANN. § 22-316.019 (1980); GA. CODE § 40-6-395 (1987 Supp.); IDAHO CODE § 49-1102 (1987 Supp.); ILL. ANN. STAT. Ch. 95½ § 11-204 (1987 Supp.); KY. REV. STAT. § 189.393 (1980); MD. TRANSP. CODE § 21-904 (1986 Supp.); N.D. CENT. CODE § 39-10-71 (1987); OHIO REV. CODE § 4511.02 (1982); OKLA. STAT. tit. 21 § 540A (1981); PA. CONS. VEH. STAT. § 3733 (1977); S.C. CODE ANN. § 56-5-750 (1976); TEX. VERN. CIVIL STAT. art. 6701d § 186 (1977); UTAH CODE ANN. § 41-6-13.5 (1987); VA. CODE § 46.1-192.1 (1986); WASH. REV. CODE § 46.61.024 (1985); WIS. STAT. ANN. § 346.-04(3) (1984); WY. STAT. ANN. § 31-5-225 (1985). Obviously these laws do not establish that the absence of visual or audible signals are not a seizure. However, it is indirect authority for that proposition in that the use of an audible or visual signal does constitute a seizure, i.e. failure to obey is a crime, and one is not free to leave.

> When Petersen travelled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was travelling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination when he exited from public roads onto private property.

Id. at 281. *See also, Katz v. United States,* 389 U.S. 347 (1967) (What a person knowingly exposes to the public is not subject to Fourth Amendment protection.) Likewise, the respondent by running on a public sidewalk knowingly exposed himself to surveillance by the police.

B.

THE RECOVERY OF THE PACKETS OF DRUGS BY THE POLICE WAS NOT A SEIZURE OF THE RESPONDENT'S PROPERTY SINCE THE DRUGS WERE VOLUNTARILY ABANDONED.

This Court has made clear that the warrantless seizure of abandoned property is not a violation of the Fourth Amendment. In *Abel v. United States,* 362 U.S. 217 (1960), the respondent packed his effects and checked out of the hotel but left certain items behind in the waste basket. Justice Frankfurter, writing for the majority, concluded that it was not:

> unlawful to seize the entire contents of the wastepaper basket, even though some of its contents had no connection with crime. So far as the record shows, petitioner had abandoned these articles. He had thrown them away. So far as he was concerned, they were *bona vacantia.* There can be nothing unlawful in the Government's appropriation of such abandoned property.

Id. at 241.

In this case, it is undisputed that the respondent threw the packets of drugs on the ground after sighting the police. Lower courts have held that a person disposing of property even at the sight of police have abandoned such property. *United States v. Jones,* 707 F.2d 1169 *cert. denied* 464 U.S. 859 (10th Cir. 1983) (left satchel on pavement and ran away); *United States v. Koessel,* 706 F.2d 271 (8th Cir. 1983) (drugs thrown under car); *United States v. Edwards,* 261 A.2d 834 (D.C.App. 1970) (dropped grocery bag of drugs). Attempting to hide drugs has been held to negate their relinquishment. *See City of St. Paul v. Vaughn,* 306 Minn. 337, 237 N.W.2d 365 (1975) (Defendant hid narcotics in eye glass case under counter in a dry cleaning store). However, in this case there was no attempt to hide the drugs; therefore, there was a voluntary abandonment.

The *Amici* States agree that if the abandonment of property is procured by police through illegal means absent good faith, the drugs would fall within the fruit of the poisonous tree doctrine of *Won Sun v. United States,* 371 U.S. 471 (1963). However, since the pursuit of the respondent is not a seizure of his person, there still remains the question of whether the police activity in this case nullifies the voluntariness of the abandonment. The following hypothetical posed by a noted criminal procedure commentator will help illustrate why the Court should find a voluntary abandonment on these facts:

> Assume this scenario: Officer A parks his car, steps out, and walks down the street in the direction of B, who, upon seeing the officer approaching him, proceeds to "ditch the stuff" because he fears that the officer will search him. Surely the Fourth Amendment does not protect people from decisions which.

> in retrospect, appear unwise, and thus the mere fact that B (correctly or incorrectly) thought he was going to be searched and consequently attempted to get rid of the incriminating evidence is not enough to negate his abandonment. Nor is it particularly helpful to look to the state of mind of officer A rather than suspect B. Even assuming that it can be established that it was A's intention to make what would have been an illegal seizure of search of B, this is likewise not enough to warrant holding the abandonment ineffective; the unexecuted intention of the officer should not govern in light of the fact that the incriminating evidence was come by without the necessity of a seizure or search. Yet, this case cannot be disposed of upon the generalization that the mere act of approaching a person can never amount to "provocation by the officers which could be said to have forced defendant to drop" the object. If officer A had on several previous occasions, upon seeing B on the street, stopped, approached him, and then subjected him to a search, then certainly the mere act of approaching on this occasion deserves to be characterized as "harassing official conduct."

1 W. LaFave, *SEARCH AND SEIZURE*, § 2.6(b) (1987).

The only factual differences between the present case and Professor LaFave's hypothetical are: 1) the respondent ran before he "ditched" the drugs; and 2) Officer Peltier was in a marked police car. However, these distinctions compel no different analysis. There is no evidence in the record that Officer Peltier had harassed the respondent in the past. The respondent's foolhardy acts of running at the sight of the marked police car and then attempting to "ditch" the drugs in plain sight of the officers who were pursuing the respondent does not render the abandonment involuntary. Moreover, the subjective intentions of the officer to "chase" the respondent are irrelevant. *Cf. Berkemer v. McCarty*, 468 U.S. 420 at 442 (1984) (A policeman's unarticulated plan has no bearing on the question of whether a suspect is in custody. The relevant inquiry is whether a reasonable person would believe he or she is in custody). Simply stated, the respondent's abandonment of the packets of drugs was voluntary and therefore, their recovery by Officer Peltier was not subject to the Fourth Amendment.

II.

THE UNPRECIPITATED FLIGHT OF THE RESPONDENT AT THE SIGHT OF A MARKED POLICE CAR DOES CONSTITUTE A SUFFICIENT BASIS TO JUSTIFY AN INVESTIGATORY PURSUIT.

The propriety under the Fourth Amendment of an "investigatory stop" based upon reasonable suspicion of criminal activity was established by this Court nearly two decades ago in *Terry v. Ohio*, 392 U.S. 1 (1968), where Chief Justice Warren stated the test as follows:

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances.

Id. at 21.

The Court further articulated this test to include the following two parts in *United States v. Cortez*, 499 U.S. 404 (1981):

> The idea that an assessment of the whole picture must yield a particularized suspicion contains two elements, each of which must be present before a stop is permissible. First the assessment must be based upon all the circumstances. . . .
>
> * * *
>
> The second element contained in the idea that an assessment of the whole picture must yield a particularized suspicion is the concept that the process just described must raise a suspicion that the particular individual being stopped is engaged in wrongdoings.

Id. at 418.

This Court has never been confronted with the question of whether flight of a person at the sight of a marked police car alone or even coupled with other factors constitute reasonable suspicion sufficient to justify a *Terry* investigatory stop. Commentators and lower courts have stated that flight alone cannot give rise to give police probable cause to arrest W. LaFave, 1 *SEARCH AND SEIZURE* § 3.6 (1987); *United States v. Green*, 670 F.2d 1148 (D.C. Cir. 1981); *Michigan v. Shabaz*, 424 Mich. 42, 278 N.W.2d 451 (1985). Yet these holdings are factually different from the present situation, i.e. arrest versus "investigatory pursuit."

Justice White in his plurality opinion in *Florida v. Royer*, 460 U.S. 491 (1983) delineated three categories of police-citizen encounters: (1) A police officer needs absolutely no basis for approaching a person in a public place to ask him or her questions. *Id.* at 497-98. (2) A *Terry* investigatory stop is justified only by reasonable suspicion that a person has or is about to commit a crime.

Id. at 499. (3) Arrest of a person must be based upon probable cause. *Id.*

This Court analyzes these cases using the following fundamental principle: the more the government intrudes upon a citizen's privacy interests, the greater the amount of justification needed for such an intrusion. In *Terry*, Chief Justice Warren, stated the principle as follows:

> [I]t is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." [citations omitted]

Terry v. Ohio, 392 U.S. at 21.

The problem in this particular case is that the facts may fall in between the first and second tier of Justice White's scale in the *Royer* case.

The pursuit of a fleeing pedestrian by a marked police car that does not use its visual or audible signals is not the same amount of intrusion as a "frisk" or "pat down" described in *Terry*.[5] Accordingly, if this Court should find it necessary even to reach the question, *amici* argue first that there is reasonable suspicion that criminal activity had or would occur based upon the respondent's unprecipitated flight. Had Officer Peltier arrested the respondent only on the basis of flight, such an arrest would probably be illegal, as there was no probable cause. On the other hand, *Amici* States argue that because he did have reasonable suspicion that respondent had or was about to commit a crime, Officer Peltier could have stopped the respondent with audible or visual signals and frisked him on the basis of the respondent's flight at the sight of a marked police car.

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[5] Of course, the *Amici* States take the position that no "seizure" of the respondent occurred at the time Officer Peltier pursued him. However, if this Court determines that such an action constitutes a seizure, the *Amici* States contend that it was justified.

In the alternative, we urge this Court to adopt a lesser standard than reasonable suspicion in light of the lesser intrusion, i.e., a reasonable belief that the occurrence of an unusual activity such as an unprecipitated flight might upon further close visual surveillance lead to additional facts that would constitute either reasonable suspicion or probable cause that criminal activity has or is about to occur.

The pursuit of the respondent in this case without the use of visual or audible signals should be justified by his flight at the sight of a marked police vehicle. Such police conduct, aimed at obtaining additional facts that would constitute reasonable suspicion or probable cause that a crime has or is about to occur should not be held to violate the constitution.

A citizen undoubtedly has the right to walk away from a police officer. *Terry v. Ohio*, 392 U.S. at 33 (Harlan, J. concurring). Furthermore, the government does not have a sufficient justification, without probable cause, to intrude upon that citizen to the extent of an arrest. However, where a citizen runs at the sight of a marked police car, that fact in and of itself should be sufficient justification, either a reasonable suspicion or the lesser standard of

reasonable belief, police to follow or pursue that citizen with no visual or audible signals in order to determine if criminal activity has or will occur.

CONCLUSION

Based on the foregoing authorities and analysis, the *Amici* States urge this Court to reverse the decision of the Michigan Court of Appeals suppressing the packets of drugs as evidence in the criminal charges against the respondent.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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NO. 86-1824

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MICHAEL MOSE CHESTERNUT,

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MICHIGAN

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, *AMICUS CURIAE,* IN SUPPORT OF THE RESPONDENT

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QUESTIONS PRESENTED

1. Whether a chase by four police officers in a marked police cruiser, of an individual who is running on foot, is a show of authority that would convey to a reasonable person that he is not free to leave, such that a fourth amendment seizure has occurred?

2. Whether flight alone, unaccompanied by any objective factor suggesting that an individual is engaged in criminal activity, can give rise to a reasonable suspicion sufficient to justify a seizure under the fourth amendment?

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INTEREST OF *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers, including representatives of every state. NACDL was founded over twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and

procedures. A cornerstone of this organization's objectives, and of the criminal justice system, is the fundamental constitutional protection of an individual's fourth amendment rights. NACDL is very concerned about any decision that would undermine or dilute this constitutional guarantee, as would adoption of the position taken by the petitioner in the instant case.

The Amicus Curiae Committee of the NACDL has discussed this case and decided that the issues are of such importance to defense lawyers throughout the nation that NACDL should offer its assistance to the Court. Both the petitioner and the respondent have consented to NACDL's participation as *amicus curiae* and letters of consent have been filed with this Court.

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STATEMENT OF THE CASE

The *Amicus* National Association of Criminal Defense Lawyers adopts the respondent's statement of the case.

SUMMARY OF ARGUMENT

The fourth amendment provides a fundamental right to privacy. This right includes the right to travel on public streets free from restraint by agents of the government. Unless the police have reasonable suspicion that an individual is, or has, engaged in a particular criminal act, that individual is always entitled to refuse to answer any questions the police put to him and is free to walk -- or run -- away from the police.

A seizure within the meaning of the fourth amendment occurs whenever the police show sufficient authority that a reasonable person would believe he is not free to leave. When the four police officers in a marked police cruiser chased the respondent in this case, they created a threatening presence that made it reasonable for the respondent to believe he was not free to leave. This resulted in a fourth amendment seizure of the respondent.

A police chase for the purpose of effecting a stop is as intrusive as the stop itself. Therefore, when the chase begins, the fourth amendment protections are triggered.

Flight from police officers does not provide any reasonable suspicion that an individual is engaged in criminal activity. The fact that an individual looks at the police does not add to or create any reasonable suspicion.

In balancing the governmental interest of effective crime prevention against the invasion of privacy created by a particular search or seizure, the government must not allow its agents to infringe upon the protections provided by the fourth amendment.

ARGUMENT

I. A CHASE BY FOUR POLICE OFFICERS IN A MARKED POLICE CRUISER, OF AN INDIVIDUAL WHO IS RUNNING ON FOOT, IS A SHOW OF AUTHORITY THAT WOULD CONVEY TO A REASONABLE PERSON THAT HE IS NOT FREE TO LEAVE, SUCH THAT A FOURTH AMENDMENT SEIZURE HAS OCCURRED

This Court has long held that every individual has the right "to the possession and control of his own person free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Union Pac. R. Co. v. Botsford*, 141 U.S. 250, 251 (1891). More specifically, this Court has held that the fourth amendment to the United States Constitution protects "people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), and that the places where people are protected include the streets. *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The words

this Court used to frame the threshhold question presented in *Terry*, whether there was in fact a seizure, apply equally in this case: "The question is whether in all the circumstances of this on-the-street encounter, . . . [the respondent's] right to personal security was violated by an unreasonable search and seizure." *Id.* at 9. This case thus focuses on an individual's right to decline to permit police officers to stop and question him, and his right to "go on his way," *Florida v. Royer*, 460 U.S. 491, 498 (1983), when the police have no reason to suspect that he has been, is engaged in, or is about to be engaged in criminal activity. Fundamentally, this case is about the right to be left alone, that cherished right to privacy inherent in the fourth amendment. *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976).

A. An Individual About Whom The Police Have No Reasonable Suspicion Is Always Free To Leave

In *Florida v. Royer*, 460 U.S. 491 (1983), Justice White, in a plurality opinion, divided police-citizen encounters into three categories. The first category involves communications between police and citizens without coercion or detention. The second category involves brief seizures that must be supported by reasonable suspicion, and the third category involves full-scale arrests that must be supported by probable cause. *Id.* at 497-99. The Court excluded the first category of police-citizen encounters from the protective shroud of the fourth amendment on the theory that if a police officer questions a person about whom he has no reasonable suspicion that person always has the option of leaving and declining to answer questions. *Id.* In excluding this first

category of police-citizen contact from fourth amendment protection, an individual retains his right to "possession and control of his own person" because he is not penalized if he chooses to walk or run away from the police.

It is precisely this right to remove oneself from the police that takes this type of encounter out of the realm of fourth amendment protection. As soon as the police chase the individual who has chosen to leave, the constitutional protections of the fourth amendment must become available to the individual, because at that point the police have exerted control over him. A seizure must include the means of implementing such seizure, as well as the actual detention. To say that one is free to leave is without significance unless it includes the freedom to leave police presence or attempted control. When the police refuse to allow that very leave taking, the right has been abridged, and constitutional safeguards must, at that point, apply. Moreover, the underlying rationale of *Royer* and *Mendenhall*, that fourth amendment protections do not apply to non-coercive police-citizen encounters precisely because the citizen is free to leave, no longer operates if the police continue to pursue the citizen when he exercises his right to leave. "Freedom to leave" must mean, at a minimum, that when a choice to leave is exercised, it can be accomplished free from a chase down the street by a car full of police officers.

B. When Police Officers Chase An Individual, That Chase Is A Threatening Presence That Constitutes A Seizure

In *United States v. Mendenhall*, 446 U.S. 544 (1980), Justice Stewart, in an opinion joined by Justice Rhenquist,

gave several examples of police activity that might indicate a seizure. Among them was "the threatening presence of several officers." *Id.* at 554. The bottom line as expressed by Justices Stewart and Rehnquist in *Mendenhall*, was that a person would be considered "seized" under the fourth amendment if in view of the circumstances, a reasonable person would believe he was not free to leave. *Id.* Three years later in *Royer*, a plurality of the Court adopted Justice Stewart's definition of a fourth amendment seizure in *Mendenhall* by requiring a showing "of official authority such that 'a reasonable person would have believed that he was not free to leave.'" *Royer*, 460 U.S. at 502. In the instant case, four officers in a marked police car chased the respondent. J.A. 21. What reasonable person would not feel that four officers chasing[1] him in their automobile, parallel to him as he ran down the street, was "a show of authority" that had effectively curtailed his movement?

That this encounter was a chase, and not a benign surveillance, is patent. To any reasonable person, the object of a chase is capture, particularly where, as here, the person being chased attempted to avoid the encounter by running from it, but the police, rather than allowing the person to avoid the encounter, chased after him to precipitate it. Because an objective standard is used to determine whether, in view of the circumstances, the defendant could reasonably believe that his freedom was being curtailed, *United*

States v. Mendenhall, 446 U.S. at 554, it is immaterial that the officers might have wanted merely to see where the respondent was running. It was not necessary to race immediately along side the respondent just to see where he was going. That objective could have been accomplished by observing the respondent at a somewhat less menacing distance. It would not be unreasonable for a person, such as the respondent, while attempting to avoid an encounter with the police, to believe that a car full of police officers chasing after him in a marked vehicle is attempting to deny him the right to avoid police contact, and in fact, is in the process of effecting a stop.

Other courts that have analyzed this issue have found, more specifically, that a person is "not free to leave" when the police refuse to allow him to leave, choosing instead to chase him. In one such case, *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979), the court held that the police chase was a coercive act and therefore a seizure and "the main reason that appellee abandoned the weapon." *Id.* at 1021. The facts in *Barnett* are strikingly similar to the facts in the instant case. In *Barnett* the officer observed the defendant walking down the street. The defendant looked in the direction of the officer, then ducked behind a parked car as the officer drove past him. The officer then alighted from the car at which point the defendant began running from him. While the defendant was being chased he discarded a weapon.

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[1] The officer who testified at the respondent's preliminary examination stated that he and his three partners were chasing the respondent. J.A. 21.

Commonwealth v. Thibeau, 384 Mass. 762, 429 N.E.2d 1009 (1981), is another case with similar facts. In that case, the defendant was riding a bicycle

when the police decided to follow and then chase him. The court held that

> [p]ursuit that appears designed to effect a stop is no less intrusive than a stop itself. In other words, the officer's right to pursue when a stop appears imminent can be no broader than his right to stop. Thus, his suspicion must be reasonable *before* the pursuit begins. Were the rule otherwise, the police could turn a hunch into a reasonable suspicion by inducing the conduct justifying the suspicion. For present purposes, a stop starts when pursuit begins.

Id. at 1010. (Emphasis in original).

In *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985), a police officer in an unmarked police vehicle observed the defendant carrying a small paper bag while walking down the street. The defendant looked in the direction of the police officer and then began to stuff the bag under his vest. After the defendant and the police vehicle passed each other, and the police vehicle nearly came to a stop, the defendant started running. The police officer put his car in reverse and backed up in the direction of the defendant, got out of the car and chased the defendant. The police officer pursued the defendant a short distance until the defendant entered a doorway. As the officer reached the doorway the defendant had entered, the defendant was coming out. The officer searched the vestibule of the building and retrieved a small paper bag within which he found a revolver. Both the State of Michigan and the defendant agreed that the lawfulness of the seizure of the revolver was "governed by the 'stop and frisk' doctrine enunciated . . . in *Terry*." *Id.* at 455. The Michigan Supreme Court, in holding that the encounter implicated constitutional safeguards, stated:

> Plainly, the police encounter with defendant in this case was not at either the first or third tier of the *Royer* analysis. The officers did not approach Shabaz merely for the purpose of questioning him, after first identifying themselves as police officers, nor was the defendant free to 'go on his way.' Indeed when he attempted to "go on his way," he was pursued and seized by the officers. . . . [T]he police-citizen encounter in this case was an "investigatory pursuit and stop," and its constitutionality is to be tested according to the standards announced in Terry.

Id. at 458.

In *People v. Terrell*, 77 Mich.App. 676, 259 N.W.2d 187 (1977), the defendant was standing on the street corner when he looked in the direction of a police officer who drove through the intersection. The defendant reached into his pocket and then ran north. The officer, who testified that he believed that there could possibly be a gun in the defendant's pocket, left his police car and gave chase. The defendant ran into an apartment building where the officer observed him pull his hand out of his pocket and drop a clear envelope containing a brown powdery substance. The officer retrieved the envelope, which he thought might contain heroin, and arrested the defendant. The State of Michigan argued in that case, as in this, that the police officer's "investigatory pursuit"[2] of defendant was justified. In deter-

mining that the trial court's suppression of the evidence was soundly based on state and federal law, the Michigan court held that "[t]he police officer's investigatory pursuit of defendant must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures," and that one must examine police action *at its inception* in analyzing the police activity. *Id.* at 188. The Michigan court recognized that the inquiry is "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.*, quoting from *Terry*, 392 U.S. at 20. The inception of the encounter in this case is the police chase of the defendant, thus placing these events squarely within the second tier of the *Royer* analysis.

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[2] The term "investigatory pursuit" appears in *People v. Terrell*, 77 Mich.App. 676, 259 N.W.2d 187, 188 (1977), and *People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451, 458 (1985), both Michigan cases, as well as in the instant case, *People v. Chesternut*, 157 Mich.App. 181, 403 N.W.2d 74, 76 (1987). The term has been interpreted by those courts to mean police activity which comes within the constitutional protections enunciated in *Terry*. In fact, the assistant prosecuting attorney in *Shabaz*, who also represents the petitioner here, conceded as much in that case. *See*, *Shabaz*, 378 N.W.2d at 458, n.7.

In a very recent decision on this issue, *In Re D.J.*, 532 A.2d 138 (D.C. Ct. App. 1987), 42 Cr.L. 2099 (Nov. 11, 1987), the District of Columbia Court of Appeals concluded that once a chase commences, a stop has begun. By taking up pursuit, the police clearly communicate that one is not free to leave.

In *D.J.*, the defendant was standing on a corner on a rainy evening when the officers' vehicle approached him. After the defendant saw the officers driving toward him, he turned, put his hands in his pockets, and walked in the opposite direction. The police put their car in reverse gear and tracked him. When the car drew abreast of the defendant, he turned again and walked back in the direction from which he had come. The police again pursued him. The defendant once again reversed direction and the sequence was repeated. As the police car

approached the defendant for a third time, an officer got out and walked toward the defendant, who began to run. The officer ran after him, and when the defendant reached the corner and encountered another officer who had been summoned, he continued to run. The officers caught him and searched him, finding packets of marijuana. In analyzing at what point a seizure occurred and constitutional safeguards applied, the court of appeals reasoned: "A person pursued by the police knows, or reasonably should know, that the object of chase is capture. When the chase commences, the stop has begun." 532 A.2d at ___, 42 Cr.L. at 2100. Whether the encounter is called a chase, as in *In Re D.J.*, or an "investigatory pursuit", as in the instant case, the outcome is the same -- fourth amendment protections are triggered.

The respondent in the instant case unequivocally asserted his lack of interest in any voluntary encounter by running from the policemen who were chasing him. Once an individual makes that decision, unless reasonable suspicion exists, the police must let him go.[3] "A police officer may not use . . .[his] authority to go around promiscuously bothering citizens." *People v. Aldridge*, 35 Cal.3d 473, 674 P.2d 240, 243, 198 Cal.Rptr. 538 (1984) (en banc).

This Court must send a clear, unequivocal message that its holding in *Royer* cannot be expanded to foreclose all fourth amendment protection to individuals who wish to avoid contact with the police. Nor should an individual about whom police have no reasonable suspicion be forced to take Olympian measures to avoid such contacts. Indeed, "[o]ne of the hallmarks of a free society is the right to be left alone: the right to walk the streets, to drive a car, to ride a bicycle, or to sit in one's yard, free from the threat of uninvited and unwarranted governmental questioning, observation, or intrusion." Burkhoff, Non-Investigatory Police Encounters, 13 Harv.C.R.-C.L. L.

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[3] If the police had not chased the respondent it is logical to assume he would not have thought it necessary to drop the package containing the drugs, therefore, the seizure of the drugs is the direct fruit of the impermissible police behavior. *See, e.g., Rios v. United States*, 364 U.S. 253 (1960); *United States v. Newman*, 490 F.2d 993 (10th Cir. 1974); *Fletcher v. Wainwright*, 399 F.2d 62 (5th Cir. 1968); *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979); *People v. Severson*, 39 Colo. App. 95, 561 P.2d 373 (1977); *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973). Furthermore, even if the drugs were abandoned before the police retrieved them, the police had no person with whom to connect them without the illegal seizure of the respondent. Without some independent evidence of respondent's identity, the police would not have known who had been carrying the drugs. Therefore, the identity of the respondent, obtained as a result of his seizure after the police chased him, was a fruit of the unlawful pursuit and seizure. *Wong Sun v. United States*, 371 U.S. 471 (1963).

Rev. 681 (1978). If the right to privacy embodied in the fourth amendment has any meaning at all, it must protect those individuals who, like respondent, choose to absent themselves from the presence of police officers. The actions of four police officers in a police car chasing respondent clearly constituted a seizure within the meaning of the fourth amendment.

II. FLIGHT ALONE, UNACCOMPANIED BY ANY OBJECTIVE FACTOR SUGGESTING THAT AN INDIVIDUAL IS ENGAGED IN CRIMINAL ACTIVITY CANNOT GIVE RISE TO A REASONABLE SUSPICION SUFFICIENT TO JUSTIFY A SEIZURE UNDER THE FOURTH AMENDMENT

A. Flight Alone Does Not Constitute Reasonable Suspicion

The fundamental issue presented here is whether flight from police officers constitutes reasonable suspicion. It is the position of the *amicus* NACDL

that to so hold would not only eliminate the long established, firmly rooted constitutional right of a citizen to be free from unreasonable detention, but would also effectively destroy the objective standards this Court has established for determining reasonable suspicion.

If flight from police officers were to constitute reasonable suspicion, what is such flight? How fast must a person leave the presence of the officer for the leave-taking to constitute flight? Is a slow walk enough? A fast walk? A jog? A sprint? At what gait and in which direction is a person's exercise of his right under *Royer v. Florida*, 460 U.S. 491 (1983), to leave and to refuse to answer a policeman transformed into flight?

The facts present here are not unique to this case, nor is the decision of the Michigan Court of Appeals novel or far reaching. Numerous state and federal courts[4] have considered virtually identical factual situations. With few exceptions, these courts have held that flight does not give rise to the reasonable suspicion necessary to support a *Terry* stop. While this Court is not bound by the almost unanimous decisions of the appellate courts which have addressed this issue, the wisdom of those decisions, issued as they are, by state court judges from throughout the nation who typically review such behavior, is instructive. *State v. Epperson*, 237 Kan. 707, 703 P.2d

761 (1985), (no reasonable suspicion when two men appeared startled when they saw approaching police car, and then got out of car and started to walk away); *People v. Aldridge*, 35 Cal.3d 473, 674 P.2d 240, 198 Cal.Rptr 538 (1984) (en banc), (no reasonable suspicion when defendants attempted to avoid police); *People v. Thomas*, 660 P.2d 1272 (Colo. 1983) (en banc), (no reasonable suspicion when defendant put his hand in pocket and ran to nearby building when he appeared to see police); *McClain v. State*, 408 So.2d 721 (Fla. Dist. Ct. App.), *pet for review dismissed*, 415 So.2d 1361 (1982), (no reasonable suspicion when defendants seemed to be avoiding detective by crossing street, walking briskly and reversing direction); *Commonwealth v. Thibeau*, 384 Mass. 762, 429 N.E.2d 1009 (1981), (no reasonable suspicion when defendant riding on bicycle fled after looking at marked police

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[4] Most cases involving this issue understandably arise out of state courts because most involve local police agencies patrolling on city streets when they see someone they consider "suspicious". Furthermore, these cases involve fourth amendment issues that are generally precluded from federal review. *See, e.g.*, *Stone v. Powell*, 428 U.S. 465 (1976).

car that had pulled up beside him); *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979), (no reasonable suspicion when defendant with his hands in the front pockets of a raincoat looked in direction of plainclothes officers in an unmarked car, ducked behind a parked car as the police vehicle passed, and then ran when police stopped); *State v. Frazier*, 88 N.M. 103, 537 P.2d 711 (Ct. App. 1975), (no reasonable suspicion when police were summoned to motel to assist in evicting person who had stayed past checkout time and defendant ran from room, was chased and stopped by police and upon questioning, fled again); *People v. Towers*, 49 A.D.2d 839, 373 N.Y.S.2d 593 (1975), (no reasonable suspicion when defendant walked away rapidly while making adjusting motion with his hands in his pocket and looking over his shoulder several times after noticing two plainclothes police officers); *Commonwealth v. Jeffries*, 454 Pa. 320, 311 A.2d 914 (1973), (no reasonable suspicion when defendant, who was walking along a public street when he saw a police officer he knew, quickened his pace and started to run when the officer began to chase him); *Wilson v. State*, 433 So.2d 1301 (Fla. Dist. Ct. App. 1983), (no reasonable suspicion when defendant moved bag from one arm to another and changed directions); *People v. Fox*, 97 Ill.App.3d 58, 421 N.E.2d 1082 (1981), (no reasonable suspicion when defendant's vehicle drove away at the approach of a squad car); *Kearse v. State*, 384 So.2d 272 (Fla. Dist. Ct. App. 1980), (no reasonable suspicion when defendant who was leaning into passenger window of car, walked briskly away from vehicle after noticing police); *People v. Tebedo*, 81 Mich.App. 535, 265 N.W.2d 406 (1978), (no reasonable suspicion when defendant began running at sight of police car).

In *People v. Thomas*, 600 P.2d 1272 (Colo. 1983) (en banc), the Colorado court succinctly summed up the reasoning behind most of these cases when it held that

> . . . the act of running a short distance to a nearby building, with or without one's hand in the pocket, is an action so universal in character that one can only speculate as to its motivating source. Even when the act of running is motivated by an effort to avoid contact with the police, it still does not constitute the type of specific and articulable fact that is constitution ally sufficient to justify a stop.

Id. at 1275. If this Court holds that running from the police creates reasonable suspicion of criminal activity, that term will have lost all meaning. Reasonable suspicion will mean virtually any conduct an officer decides in retrospect made him suspicious.

Petitioner places some reliance on *Peters v. New York*, 392 U.S. 40 (1968), *Terry*'s companion case. Such reliance is misplaced. In *Peters* the defendant was acting suspiciously by "tiptoeing furtively about the hallway." 392 U.S. at 66. Moreover, the officer heard strange noises at his door that led him to believe that the defendant sought to force entry. This Court determined that the officer had probable cause to arrest Peters for the specific crime of attempted burglary. Unlike *Peters*, the arresting officer in this case was not aware of any specific criminal activity in which the respondent had engaged at the time of pursuit. J.A. 19. The petitioner does not argue otherwise. As the *Peters* court pointed out, flight and furtive actions are indicia of *mens rea* "when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime. . . ." *Id.* at 66. Since the officer in this case had absolutely no reason to relate "the suspect to the evidence of crime," *Peters* simply does not apply.

Particularized suspicion requires an officer to suspect someone of criminal activity before he can stop him. In order for suspicion to focus on a particular suspect, however, that suspect must engage in activity that links him to some *specific* wrongdoing. *Ybarra v. Illinois*, 444 U.S. 85 (1979). In *Ybarra*, this Court ruled that an individual who happened to be in a bar in which a search warrant was being executed could not be searched because the officers had no suspicion that he was committing or had committed any crime. *See also, United States v. Place*, 462 U.S. 696, 702 (1983), (police have authority to make a stop "when the

officer has reasonable, articulable suspicion *that the person has been, is or is about to be engaged in criminal activity.*") (emphasis added); *Brown v. Texas*, 433 U.S. 47, 51 (1979), ("[W]e have required the officer to have a reasonable suspicion based on objective facts, *that the individual is involved in criminal activity.*" (Emphasis added). If mere flight from police officers becomes suspicious activity without any requirement that the suspicion be particularized, the fourth amendment will offer no protection and the governmental activities its creation was meant to curtail will inevitably reappear. *See generally, Henry v. United States*, 361 U.S. 98, 100-01 (1959).

B. Looking At The Police Does Not Add To Or Create Reasonable Suspicion.

In the instant case, the police considered it significant that the respondent looked at them. J.A. 16. Ironically, often the police also consider it suspicious when a suspect avoids eye contact with them. *See, Nicacio v. INS*, 797 F.2d 700, 704 (9th Cir. 1986), (alien's refusal to look agents in the eye considered suspicious by officer; court held "lack of eye contact is not an appropriate factor to consider."); *United States v. Lamas*, 608 F.2d 547, 549-50 (5th Cir. 1979), (avoiding eye contact cannot weigh in balance whatsoever); *United States v. Munoz*, 604 F.2d 1160, 1161 (9th Cir. 1979), ("[t]he failure of the occupants to look at the agents adds little to the case in light of the questionable value of the factor generally. . . ."); *United States v. Escamilla*, 560 F.2d 1229, 1233 (5th Cir. 1977), (although agents thought it suspicious that appellants never looked at the police car, court

held this factor "cannot weigh in the balance in any way whatsoever"); *United States v. Lopez*, 564 F.2d 710, 712 (5th Cir. 1977), ("Reasonable suspicion should not turn on the opthalmological reactions of the appellant."); *United States v. Mallides*, 473 F.2d 859, 861 (9th Cir. 1973), (conduct not suspicious simply because the occupants of an automobile failed to look at passing police car). *If* looking at the police is a factor in the balance of reasonable suspicion in one case and not looking at the police is a factor in another, reasonable suspicion is whatever the police want it to be. Every suspect will be sure to either look at the police or not look at the police.

Although the record supports only flight from the police, petitioner now argues "flight is a factor [which] taken in the aggregate [creates] reasonable suspicion. Pet. Br. 55. However, as the

California Supreme Court so aptly stated, "four times zero, in [this court's] arithmetic, still equals zero." *People v. Loewen*, 35 Cal.3d 117, 672 P.2d 436, 444, 196 Cal. Rptr. 846 (1983). What we have here is *only* flight from police officers. We must not lose sight of this Court's words in *Terry* that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry v. Ohio*, 392 U.S. 1, 27 (1968); *see also, Reid v. Georgia*, 448 U.S. 438, 442 (1980).

The amicus brief on behalf of the 32 states suggests that the fourth amendment standards be lowered even more to allow a "reasonable belief that the

occurrence of an unusual activity might . . . lead to additional facts," to become a standard for police-citizen encounters such as the one presented here. *Amicus* at 6. This concern is a red herring.

> It is absurd to suggest that it is "handcuffing" the police to dictate that they abstain from search and seizure of individuals who are going about their own business, where the patrol officers cannot demonstrate reasonable suspicion of criminal activity. In the limited number of situations where serious risks to individuals are likely to be the imminent outcome if the police fail to act, the . . . investigatory stop-and-frisk authority constitutionalizes a range of contacts which are adequate to deal with the situation. Searches and seizures of individuals, no matter the motivation for which they are undertaken, can be punitive, upsetting, and humiliating.

Burkhoff, Non-Investigatory Police Encounters, 13 Harv.C.R. - C.L. L.Rev. 681, 715-16 (1978).

Since first carving out the reasonable suspicion exception to the warrant requirement in *Terry v. Ohio*, 392 U.S. 1 (1968), this Court consistently has held that the governmental interest of effective crime prevention and detection is an interest that must be balanced against the invasion of individual privacy created by the search or seizure. *Id.* at 22. In so balancing it is crucial to remember that "good police work is characterized not only by the prevention and detection of crime but also by the avoidance of intrusions upon personal privacy in violation of the fourth amendment." *People v. Tebedo*, 81 Mich. App. 535, 265 N.W.2d 406, 409 (1978).

Indeed, "the Constitution sometimes insulates the criminality of a few in order to protect the privacy of us all."

Arizona v. Hicks, 107 S. Ct. 1149, 1154 (1987). That privacy, so cherished by this society, is at stake here.

CONCLUSION

For the reasons stated herein, *amicus*, National Association of Criminal Defense Lawyers, respectfully requests that this Court affirm the decision of the Michigan Court of Appeals.

Respectfully submitted,

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